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SUPREME COURT OF THE UNITED STATES

October Term, 1981

SYDNEY M. EISENBERG

Petitioner

vs.

GEORGE D. CROWLEY

Respondent

ON PETITION FOR CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Ruled As A Matter Of Law That Plaintiff-Respondent George Crowley Filed Motions After Verdict In The Defendant-Appellant's Federal Tax Case In A Timely Manner?
   The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.
2. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Rendered Erroneous Instructions To The Jury?
   The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.
3. Did The Trial Court Violate Defendant's Right To Due Process of Law Under The

United States Constitution When It Rendered A Verdict Form Containing Assumed Facts In Dispute And Therefore Invaded The Province Of The Jury?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

4. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Refused To Adjourn Motions After Verdict Until A Transcript Could Be Prepared?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

5. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Allowed Plaintiff's Counsel To Refer To Defendant As Being Guilty Of Murder In The Presence

Of The Jury?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

6. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Denied Defendant-Appellant His Constitutional Right To Confront Witnesses Testifying Against Him?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

7. Did The Trial Court Violate Defendant's Right To Due Process Of Law Under The United States Constitution When It Allowed To Stand Plaintiff Crowley's Refusal To Interpose A Defense For Defendant In the Tax Trial Without Making A Finding That Such Was Malpractice?

The Trial Court answered in the negative and was affirmed by the Wisconsin Court of Appeals and Wisconsin Supreme Court.

8. Did The Supreme Court Of The State Of Wisconsin Violate Defendant's Right To Due Process Of Law When It Refused To Review The Decision Of The Wisconsin Court Of Appeals When Said Decision Was Authored By Honorable Leo Hanley, A Justice Who The Defendant-Appellant Filed A Timely Request For Substitution Against Which Was Ignored? The Wisconsin Supreme Court answered this in the negative.

LISTING OF PARTIES

All parties to this proceeding are George D. Crowley and Sydney M. Eisenberg.

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OPINIONS OF LOWER COURTS

Neither the decision of the Wisconsin Court of Appeals (App. p. A3) nor the decision of the Wisconsin Supreme Court (App. p. A1) were published in any official or unofficial report.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States Supreme Court is based on United States Code Title 28, Section 1257(3). The Wisconsin Court of Appeals filed its decision in this matter on July 21, 1981. (App. p. A3) The Wisconsin Supreme Court denied appellant's Petition for review on December 7, 1981. (App. p. A1) No petitions for rehearings were filed by either party.

CONSTITUTIONAL PROVISIONS

ARTICLE XIV - UNITED STATES CONSTITUTION - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION: APPORTIONMENT OF

REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the

Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to

support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emanicipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

This was an action originally commenced by the filing of a Summons and Complaint by George D. Crowley alleging that Sydney M. Eisenberg owed him attorney fees for Crowley's representation of Eisenberg during a federal criminal tax case involving three counts of filing false income tax returns.

Although there was a substantial body of evidence to contradict the government's case, nothing whatsoever was presented and, for the most part, it was not properly investigated, although Mr. Crowley was paid over $21,000.00 to do so. The ramifications of such evidence and the impact of such is still unfolding, although more than five years have elapsed since the trial. The chief government witness selectively obtained evidence from Mr. Eisenberg and drew erroneous conclusions therefrom without any regard to Mr. Eisenberg's

constitutional rights. Later this witness changed and altered his testimony to cover up his earlier compromises of Mr. Eisenberg's rights and the very facts themselves. As can be noted in the order of Judge Harlington Wood this issue and the alleged perjury effort to cover up such procedure still is under serious scrutiny and investigation. Judge Wood is presently taking testimony on this subject on a writ of corum nobis. Although the evidence needed to acquit Eisenberg in his tax trial was presented to Crowley he did nothing with it.

In serious disregard of Mr. Eisenberg's constitutional rights, Crowley waived the right to put in a defense over the strong objection of his client. One of the cornerstones of our judicial system is the duty and right to defend oneself against false legal accusation. One constitutional question there-

fore is whether an attorney can waive the right to testify and defend himself. It is the position of this petitioner that any attorney cannot waive such a right of a defendant. There are a number of other constitutional issues that are involved, such as including a waiver of jury, counsel's improper tactics and misconduct causing defendant to waive a jury, as well as the State court improperly compelling Eisenberg and an attorney on his behalf to argue motions and prepare appeals without the benefit of a transcript where there is an issue of fact as to what happened in court, the court reporter being fully paid in advance and failed to produce a transcript until after ordered to do so several times by the Wisconsin Court of Appeals, long after the original decision was made by the initial trial court.

Mr. Crowley did not stop there, however.

When the tax trial judge suggested that he might favorably consider a motion for a new trial in the interests of justice, Crowley deliberately filed the same untimely. This forced the federal trial judge to construe it as a motion for a new trial based on newly discovered evidence. Since the format was an "interests of justice" approach, the motion was not properly organized as one based on newly discovered evidence. As such, it was denied. In the instant case therefore, Eisenberg counterclaimed for legal malpractice. The trial of this matter was marked by repeated denials of due process. The night prior to the trial the prime Milwaukee newspaper printed a particularly adverse article on Eisenberg. When questioned, most jurors acknowledged reading the article. The trial judge failed to properly instruct the jurors. During closing arguments opposing counsel referred to Eisenberg

as a "murderer". This slander was totally ignored by the trial court and a mistrial was not ordered. Other constitutional rights were denied. The special verdict strongly suggested that Eisenberg owed money to Crowley, and instructions that the Trial Court said were to be given were withheld. Finally, defendant was also denied his constitutional right to a fair trial because he was forced to argue motions after verdict without the assistance of having a trial transcript prepared. This occurring even though he was absent for part of the trial and was called a murderer in another part, and paid for a transcript withheld by the reporter from the Trial Judge and appellant. Opposing counsel, of course, denied he made the remark. The request for a continuance on motions after verdict until a transcript could be completed was denied, and the defendant was not believed. All motions were denied.

On Appeal to the Court of Appeals a reserve judge had to be appointed to fill a vacancy. Judge Leo B. Hanley was appointed. Mr. Eisenberg sought to exercise his constitutional right to request a substitution of this justice. This demand was blatantly ignored. It was not even given the due process requirement of an order denying it. Further, Judge Hanley not only sat in on the decision; he authored it. The Court of Appeals affirmed the trial court's rulings.

The Supreme Court of Wisconsin was petitioned for review. On December 7, 1981 they denied this petition.

STATEMENT OF FACTS

This action resulted out of legal representation of the defendant-appellant, Sydney M. Eisenberg, by plaintiff-respondent, George D. Crowley. Sydney M. Eisenberg had been indicted for three counts of willfully filing

a false income tax return in 1975. Defendant did not prepare the tax returns in question. Initially, other lawyers were retained to file dismissal motions and other attacks against the indictments, but, these having been denied, it appeared obvious the matter would proceed to trial. Defendant planned a trial on all the issues. Thus, in December of 1975, Sydney M. Eisenberg decided to look for experienced trial counsel. Through other members of the State Bar, he was referred to George D. Crowley, of Chicago, Illinois. When he first met with Mr. Crowley, he discussed representation. At that time dismissal motions had been filed by Attorney James Shellow. Mr. Eisenberg expected Mr. Crowley to argue the motions. As it occurred, no one argued the motions, and they were denied.

The retainer agreement was that Sydney M. Eisenberg would pay George D. Crowley the

sum of Twenty Thousand Dollars for the trial and including any appeal to the Court of Appeals. If the matter had to be appealed, an additional Three Thousand Dollars would be paid for printing of briefs. The fee did not include a petition for certiorari to the United States Supreme Court, if necessary. If the dismissal motions above noted were successful, only Ten Thousand Dollars would have to be paid. This was the entirety of the fee agreement.

A total of Twenty Three Thousand Dollars was paid to George D. Crowley. The case was to be tried by a jury.

At the commencement of the trial Mr. Crowley asked Mr. Eisenberg to sign a jury waiver. This was the first Mr. Eisenberg knew the case was not going to be tried to a jury. Due to the intimidation of the circumstances, Mr. Eisenberg had nothing to do but to sign

the statement. Later it was determined that without discussion with his client, Mr. Crowley waived the jury at a pretrial he would not allow Mr. Eisenberg to attend.

After the Government rested its case, Crowley moved for a dismissal. This motion was denied. Then, without putting on a single witness, Mr. Crowley rested the defense case. He moved again for dismissal. That motion was, likewise, denied, and the defendant was convicted.

Later Sydney M. Eisenberg discovered that George Crowley had not personally interviewed any of the prospective witnesses. Mr. Eisenberg had submitted a detailed list of people, had accountants standing by, and practically begged to testify on his own behalf. All of this was ignored by plaintiff-respondent, George D. Crowley.

Not only did George Crowley put Sydney

Eisenberg in a position where he lost a great deal of stature, was the subject of public disgrace by way of the loss of his license to practice law, but Mr. Crowley continued to bill Mr. Eisenberg in excess of their agreement for work that was not completed in any competent or acceptable fashion.

When George Crowley brought this suit to collect the money he claimed was owing, Sydney Eisenberg counterclaimed for the legal acts of malpractice committed.

During this trial the Trial Court would not allow Mr. Eisenberg to cross-examine witnesses who were testifying against him. This was absolutely necessary because his counsel, Ray McCann, was not present at the Federal Court trial.

Defendant told Federal Judge Wood, when he was permitted to speak for the first time,

after the Judge announced the conviction, that he had told his attorneys he wanted to take the stand and that he still wanted to take the stand. This meant that defendant was entitled to move within seven days for a new trial in the interest of justice. Mr. Crowley assured him it would be done. He neglected to do so. He is certainly guilty of negligence as a matter of law.

Defendant maintained that under no circumstances was he interested in paying Twenty Thousand Dollars for not defending an action such as signing a false return without putting in a defense of any kind, shape, form or manner. Defendant is an experienced lawyer, and under no circumstances whatsoever would he ever have done this to anybody else, nor did Mr. Crowley have a right to treat the defendant in this manner. Plaintiff Crowley simply returned to Chicago, and neglected to

prepare the motion, which should have been brought within seven days for a new trial in the interest of justice. Instead, plaintiff Crowley later got out a motion for a new trial on the grounds of newly discovered evidence, losing an advantage obtained by Mr. Eisenberg, who then determined that Mr. Crowley simply did not understand the case, was in a hurry to get back to Chicago to celebrate a birthday party, and thus terminated defendant's right to a fair trial. Defendant retained a new lawyer to take appeal to the Court of Appeals and seek a new trial there. The new appeal lawyer lost the case, primarily because the case had not been rebutted by Mr. Crowley

Moving for a new trial in the interest of justice when the Federal Judge observed that defense counsel never defended the case, never called a witness, nor attempted to give

any explanation of what had happened, is far different from seeking a new trial on the grounds of newly discovered evidence. Such a difference is both patent and obvious to anyone bothering to understand the situation. Judge Fiedler apparently did not realize the significance of Attorney Ray McCann not having tried the Federal Court case, and not being aware of all of the facts in said case. When Judge Fiedler refused to permit defendant to interrogate the witnesses, defendant was again placed in a weird position. In the Federal Court case defendant had to sit a distance away from plaintiff Crowley, because plaintiff Crowley insisted that he would try the case without any suggestions from defendant. When defendant attempted to write questions on a piece of paper to be asked of the witnesses, his attorney, Mr. Crowley, disregarded them and threw them away. Defen-

dant therefore withdrew entirely from sitting anywhere near Attorney Crowley and moved to the divider rail where the spectators are.

Judge Fiedler refused to permit Mr. Eisenberg to ask any questions, even though he should have been permitted to do so under the law, and all of the circumstances. Attorney McCann could hardly have been expected to know all the circumstances in the tax case as well as the instant case, when the intricate issues which were involved had to be fully explained to a jury. Certainly here was a miscarriage of justice. Plaintiff and his co-counsel, as well as other witnesses, should have been examined by defendant, and it was clearly a miscarriage of justice under all the circumstances. Mr. McCann could not possibly have remembered all the issues involving negligence by the plaintiff in the Federal Court case.

One can easily imagine how the jury viewed the situation when Mr. Eisenberg, attempting to whisper to Mr. McCann, who had difficulty in hearing the whispers, with Mr. McCann asking a question, and subsequently Mr. Melnick telling the jury to remember how Mr. Eisenberg had dominated this trial. Therefore, the conclusion would only be that Mr. Eisenberg did the same thing in the tax hearing. The truth is that defendant appeared to be attempting to dominate Mr. McCann by insisting on asking certain questions without shouting why he was doing so. The situation verged on the ludicrous. Certainly, it appeared if defendant would attempt to dominate Mr. McCann and get him to ask questions he did not want to ask, he must have done the same thing with Mr. Crowley. The effect was chilling on defendant's rights. Under all the circumstances, Judge Fiedler was obviously mistaken when he ruled

against Mr. Eisenberg interrogating witnesses. Every defendant has a right to be co-counsel in his own case if he is an attorney.

Appellant had been unable to find in the transcript Mr. Eisenberg's request of Judge Fiedler to permit him to interrogate the witnesses. The failure of the reporter to so report is typical of the reporting in this case. The Court is aware of the difficulty Appellant has had in even obtaining the transcript herein. Appellant therefore moved to expand the record by permitting the affidavit of Sydney M. Eisenberg to be included in the record, to the effect that he did request the Court for permission to interrogate the witnesses, and the Court refused. The failure of the Trial Court to provide adequate reporting services is also significant. No transcript was available for the hearing on motions after verdict herein. The testimony

allegedly transcribed was apparently done by the reporter dictating her notes to someone else. A tremendous amount of time was lost throughout all this. Mr. Melnick interrogated defendant on his income taxes. He showed gross income of Eisenberg for one year of over $900,000. When Defendant attempted to show the net income of only $14,000, the Court stopped defendant, and said he would straighten out the entire matter by an instruction to the jury. The Trial Judge did nothing further in the matter, and the jury was left with the conclusion that defendant was earning about a million a year, had clearly murdered a judge (not literally, just "cleverly"), was suspended twice as a lawyer, was saved by the plaintiff lawyer from going to prison and that his lawyer, for totally undisclosed reasons, had no duty to defend the case, investigate witnesses, call witnesses to the stand, discuss

and obtain from his client an agreement to waive a jury, not to tell the Federal Judge there will be no jury if he is the attorney for the defendant at time of trial. There is only one conclusion to reach here. There was a miscarriage of justice and violation of constitutional law.

During the trial the Trial Court erred on several occasions, allowing the jurors to become biased by way of newspaper clippings nine of the twelve admitted reading, by allowing the plaintiff's counsel to make gestures and derogatory references to the defendant as a murderer, and making other rulings in violation of constitutional rights.

The jury in answering a verdict, that, in itself, made factual determinations by suggesting that two separate agreements were made between plaintiff and defendant, one for fees to the end of trial and one for fees after,

awarded the Plaintiff damages and denied the Defendant any remuneration.

From this error-filled trial the Defendant appeals, seeking reversal and new trial.

ARGUMENT

I. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS WHEN IT RULED AS A MATTER OF LAW THAT PLAINTIFF-RESPONDENT GEORGE CROWLEY FILED MOTIONS AFTER VERDICT IN THE DEFENDANT-APPELLANT'S FEDERAL TAX CASE IN A TIMELY MANNER.

An opportunity for a hearing is one of the essential elements of due process. Shields v. Utah Idaho C. R. Co., 305 U.S. 177, 83 L. Ed. 111, 59 S. Ct. 160 (1939); Powell v. Alabama, 287 U.S. 45, 77 L. ed 158, 53 S. Ct. 55 (1930) 84 ALR 527. In the case at bar the plaintiff-respondent George Crowley totally neglected the defendant's right to be heard on a motion after trial attacking the criminal finding by the federal judge on grounds of the interests of justice. The uncontested fact remains that no timely motion of this sort was filed in the Federal tax case by the plaintiff-respondent. The Trial Court in the present action, with no support whatsoever, found that the motion was

timely as a matter of law. This arbitrary action by the Trial Court extended the violation of defendant's right to due process. Washington ex rel Oregon R. & Nov. Co. v. Fairchild, 224 U.S. 510, 56 L. Ed. 863, 32 S. Ct. 535 (1917). The right to due process also includes the right to have decisions of the Court based on evidence received. Baltimore & O. R. Co. v. United States, 298 U. S. 349, 80 L. Ed. 1029, 56 S. Ct. 797 (1932).

Mr. Eisenberg specifically requested his counsel to file immediately after the decision in the tax case a motion for a new trial in the interest of justice. This request was made when the Court appeared to be sympathetic to the taxpayer's statement to the Court telling the Judge he wanted an opportunity to take the stand and explain the facts. The facts to be explained had to be while defendant was on the stand, and not in a statement to the Court

after a finding of guilty.

Defendant requested an immediate motion for rehearing in the interests of justice, but Mr. Crowley procrastinated until the seven days were up and over. This was patent and clearly negligence.

The trial court herein addressed this point on several occasions. It first addressed the point in the following discussion in chambers:

> "THE COURT: Let the record show this is a conference held in the absence of the jury. Present are both counsel and both parties to this action. The Court has concluded that the questioning by Mr. McCann, both of Mr. Manning and of Mr. Crowley, relate to this motion filed with the Federal Court on the grounds for a new trial on the grounds of newly discovered evidence has been completely misleading.
> "I have read defendant's Exhibit Two, which we received in evidence yesterday, and which constitutes the decision of Judge Wood relating to those motions. And at pages fifteen and sixteen Judge Wood differentiates

"between the timely filing of that motion for different reasons than what is appearing before this jury.
"At page fifteen, at the bottom thereof, Judge Wood uses this language: 'If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict of a finding of guilty' and at the top of page sixteen, 'is to be granted when in the interest of justice'.
"He goes on to state that a motion for new trial based upon newly discovered evidence made at the end of a seven day period would be granted and conditions that he then there tests. That is entirely different from the impression that is being given to this jury on the basis of these questions.
"These questions by Mr. McCann to both of these witnesses has been designed, it seems to me, to make it appear that the motions was not timely filed, and that is not the fact based on Judge Wood's decision."

The Trial Court capped all questioning along these lines after Mr. McCann was inquiring into the propriety of an oral motion made after trial when the Federal Rule specifically called for only written motions.

"Mr. Melnick: I am going to move that this all be stricken."
"The Court: The defendant's Exhibit two,

"which has been identified as post-trial motions of the defendant, there is a filing stamp of the U. S. District Court of December 10, 1976, the Judgment or -- strike that."

"The date of sentencing, June 29, 1976. Defendant's Exhibit Eight, which has been received in evidence, relates to the Federal Rules and provides for the filing of a motion based on newly discovered evidence within two years after judgment, and further provides that a motion for a new trial based on any other grounds other than newly discovered evidence must be within seven days after verdict or finding of guilty and such further time as the Court may fix during the seven-day period."

"The only motion filed on behalf of the defendant for a new trial was that on the grounds of newly discovered evidence. The Court finds as a matter of law that the motion was timely filed. The objection is sustained. The evidence is irrelevant."

Mr. Crowley was simply in a hurry to leave Milwaukee. He had obtained $23,000.00 from Defendant. Defendant was disgraced by virtue of the conviction, and plaintiff Crowley had simply decided that he was not going to defend the case, was going to "pick up the marbles" and leave town. This is what he did.

"New Evidence Submitted by Defendant. Defendant has asked this Court to consider evidence not presented at trial in conjunction with his Motion for Judgment of Acquittal. The question presented on motion for judgment of acquittal pursuant to Fed. R. Crim P. 29 is whether the evidence adduced at trial is sufficient to sustain a conviction. Rule 29 does not authorize consideration by the Court of evidence not presented during the course of the trial.

"This Court agrees with the Government that the proper procedure for consideration of new evidence is set forth in Fed. R. Crim P. 33 which governs motions for new trial. Accordingly, this Court will regard defendant's requested admission of new evidence as a motion for a new trial.

"If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict or a finding of guilty it is to be granted when in the interest of justice. Wright, Federal Practice & Procedure, §557. If a motion for a new trial is not made within this seven-day period, a new trial is warranted only if the newly discovered evidence discloses: (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative of impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Wright, Federal Practice & Procedure, §557.

"Since the newly discovered evidence in the case at bar was not presented to the Court within seven days of this Court's judgment of guilty, the more stringent standards of the four-part test must be applied. ...."

The failure to move for a new trial in the interest of justice within seven days was devastating, in view of the Judge's comment subsequent to hearing defendant's statement after a finding of guilty when defendant was asked if he had anything to say. It is obvious from the reading of this decision that Judge Wood construed the motion as one for a new trial based on newly discovered evidence because that was the only motion that could be contemplated at the time. The motion, itself, did not address itself in its entirety to newly discovered evidence. Even in those portions where it did the burden for newly discovered evidence submitted before the expiration of the seven-day period is much more favorable to the party coming forth with it

than any motion made by the plaintiff-respondent in the Federal Court which came too late to take advantage of a request for a new trial in the interest of justice. It came too late to take advantage of the favorable newly discovered evidence rules during the first seven days after sentencing.

Furthermore, the issue goes far beyond whether, under some distorted legal view the motion plaintiff-respondent made was timely. The issue also presents questions as to why either motions that would be much more appropriate and more likely to be granted, why these motions were not made at all.

The Trial Court, by ruling as a matter of law that the motion was timely filed, and that all such inquiry was irrelevant, abused its discretion. Only in the clearest of cases, when the evidence is uncontroverted, should a trial court make factual findings as a matter

of law. If there is any question the ruling should be reserved until the jury can pass on some fact. Hoffman v. Wausau Concrete Co., 38 Wis. 2d 472, 207 N.W. 2d 80 (1973); Zillmer v. Miglautsch, 35 Wis. 2d 691, 151 N.W. 2d 741 (1967).

The case presented by defendant's counterclaim was most apparent in the callous neglect of plaintiff to file these important motions after continual pleading by defendant. It is clearly grounds for a new trial in the interest of justice that defendant be allowed to litigate his unfair treatment by the plaintiff-respondent.

II. THE INSTRUCTIONS TO THE JURY GIVEN BY THE TRIAL JUDGE VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS.

Due process requires that the tribunal hearing a matter be fair and impartial. Re Murchison, 349 U.S. 133, 99 L. Ed. 942 S. Ct. 623 (1955); Buck v. Bell, 143 Va. 310, 130

S. E. 516, 51 ALR 855 aff'd. 247 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1921). Yet in the case at bar the jury was given partial information and tainted in many ways.

A. THE ISSUE OF ADVERSE PUBLICITY WAS AN ISSUE DURING THE TRIAL AND THE JURY SHOULD HAVE BEEN INSTRUCTED.

It was noted by the Court during the December 5, 1979 proceeding that a Milwaukee Journal article appeared in the paper the previous evening. The article dealt with Mr. Eisenberg's suspension from practice and a pending appeal on that issue. Nine of the twelve jurors and two alternates admitted to reading the article. The Court asked each of the jurors that read the article if they thought the article could be put out of their minds when deliberating. All responded they could. The Court, however, gave no instruction for them to so disregard the article.

It is obvious that defendant-appellant

and his attorney held the position that this article was damaging. The defendant stated the following about the article:

> "(In chambers) The Defendant. This is a situation -- First of all, the article is incorrect as to reporting of it. The only -- Your Honor, I wasn't planning to argue until we saw this in the paper. There are certain things that have to be read to the jury to get the record straight that are in evidence. I don't intend to go outside of the evidence, nor would I do anything to bring about an objection. I am not going to; if he wants to object, he can.
> "THE COURT: I have ruled that you may argue.
> "The Defendant: On this thing, we were talking about how to correct it. We don't want to move for a mistrial. We don't know what damage was done and so forth; and we thought -- and this -- I don't know how Your Honor would think it could be handled; but, if, for example, the jury were simply asked did they -- raise your hand if you read the article, that would be one indication to you.
> "The Court: Suppose all fourteen raise their hand, what am I supposed to do?
> "The Defendant: If they did read it, I would assume -- I don't know. I don't know. I thought this, Judge --
> "The Court: I will handle it.
> "The Defendant: Let me just suggest this, what Mr. McCann said; if they did read it, we get instruction; and, if I were to read

"from the evidence, from the matters in evidence to the jury, so that they at least -- I could describe, try to show what happened, believe the Journal or believe the evidence.
"The Court: I will handle that article."

There can be no doubt that this article and its effect on the jury was an issue during the trial. The Wisconsin Supreme Court has held that it is error for a court to refuse to instruct the jury on an issue which is raised. Lutz v. Shelby Mut. Ins. Co., 70 Wis. 2d 743, 235 N.W. 2d 426 (1975). Even if the Court adopted the position of the plaintiff-respondent's counsel that the article was not prejudicial the jury should have been instructed since the impact of the article was in conflict. U. S. Fidelity & Guaranty Co. v. Frantl Industries, Inc., 72 Wis. 2d 478, 241 N.W. 2d 421 (1976).

After it was demonstrated that a substantial majority of the jurors had read the article, the absence of the requested instruct-

ions was erroneous.

B. NO INSTRUCTION WAS SUBMITTED REGARDING DEFENDANT'S GROSS INCOME AS OPPOSED TO DEFENDANT'S NET INCOME.

Another point where no instruction was given, although the opportunity clearly presented itself that the jury would be confused, was in regard to defendant's income. Plaintiff's counsel, using a tax return that was in evidence cited the fact that defendant had earned $900,000 in one year. Defense counsel maintained that the plaintiff's attorney was arguing under a theory of gross income. During the year in question the defendant netted $14,000, a substantial difference. The case law in Wisconsin requires that when inconsistent theories are advanced, instructions encompassing and explaining both theories must be given. Aetna Cas. & Sur. Co. v. Osborne McMillan Elevator Co., 26 Wis. 2d 292, 132 N.W. 2d 510 (1965).

In conclusion, the instructions given to the jury were seriously deficient. When coupled with the following argument, that the verdict form used, in that it contained assumed facts, invaded the province of the jury, it becomes obvious that the jury was biased and the verdict tainted. A new trial must, therefore, be accorded the defendant-appellant.

III. THE VERDICT FORM CONTAINS ASSUMED FACTS IN DISPUTE AND THEREFORE INVADED THE PROVINCE OF THE JURY AND VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS

As was noted above the tribunal hearing a matter should be free from partiality. Re Murchison, supra. Another aspect that compromised the impartiality of the jury was the suggestive form of the verdict.

The first three questions of the special verdict utilized in this case are as follows:

> "1. What sum of money, if any, is due the plaintiff, George D. Crowley, by the defendant, Sydney M. Eisenberg, for services rendered by the plaintiff to the defendant up

"to June 24, 1976, in the following respects:

a. Legal Services? Answer:$_____
b. Expenses? Answer:$_____

"2. Did the defendant agree to pay the plaintiff for legal services rendered and expenses incurred after June 24, 1976? Answer:_____

"3. If you answer Question 2 "Yes" then answer this question: What sum of money will fairly and reasonably compensate the plaintiff for legal services rendered and expenses incurred after June 24, 1976?

a. Legal Services? Answer:$_____
b. Expenses? Answer:$_____

It is obvious that the instructions divide the plaintiff's and the defendant's dealings into two distinct categories; those before June 24, 1976 and those after. June 24, 1976 was the date of sentencing in the Federal criminal tax case. The suggestion is clear that one fee agreement covered one portion of time and another portion covered another portion of time. Thus, the jury could conclude that any work done by plaintiff after June 24, 1976 would entitle him to more fees, since the original contract only went to June 24,

1976.

The evidence on this was in direct opposition. Although Mr. Crowley saw it as set forth in the verdict, Mr. Eisenberg believed the original contract went far beyond June 24, 1976. Mr. Eisenberg testified as follows:

> "Mr. Eisenberg: My understanding was after the discussion that I was to pay Twenty Thousand Dollars for the trial and including the Court of Appeals if I had to go there; but if I had to go to the Court of Appeals, I had to add Three Thousand Dollars for briefs. Then I was to pay Thirty Thousand Dollars to go all the way through, if I had to go to the United States Supreme Court, including the petition for certiorari. If the case was dismissed on motions, which Mr. Crowley agreed to handle, I am trying to be responsive if I may, then only Ten Thousand Dollars." (Testimony of Sydney Eisenberg, Transcript of Proceedings dated November 27, 1979, p. 130, App. p.A34)

This grasp of a date and the suggestion it carries that two contracts existed is certainly an incorporation of an assumption by the Court with regard to a disputed fact. Such practice invades the province of the jury and

is in error. Webb v. Wisconsin Southern Gas Co., 27 Wis. 2d 343, 134 N.W. 2d 407 (1965).

The law in Wisconsin is that it is error sufficient to reverse a judgment for counsel to impute facts not pertinent to the issue but only calculated to prejudice the case. Chapman v. Keefe, 37 Wis. 2d 315, 155 N.W. 2d (1967).

It is obvious that the remark made by Mr. Melnick bore no pertinence whatsoever to the issues before the jury. It was made simply to induce prejudice into the jury. Conduct such as this cannot be condoned. There can be no doubt that the cumulative errors outlined thus far had the effect of prejudicing the jury. Defendant-appellant had the right to a fair and unbiased jury. He is, thus, entitled to a retrial. The U.S. Constitutional right to due process was disregarded again and the result was a disaster.

IV. THE TRIAL COURT VIOLATED THE DUE PROCESS RIGHTS OF THE DEFENDANT WHEN IT REFUSED TO ADJOURN MOTIONS AFTER VERDICT UNTIL A TRANSCRIPT COULD BE PREPARED.

Due process requires that a party affected by a proceeding shall have the right to raise such issues or to establish such defenses which he may have in the cause. Willner v. Committee on Character & Fitness, 373 U.S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175 (1964). In the case at bar defendant was wholly prohibited from making any reasonable presentation on motions after verdict since he was prohibited from first securing a transcript.

The defendant-appellant and his attorney did all they could to procure a transcript before the hearing. Mr. McCann, defense counsel, detailed these steps:

> "Now, there are quite a few problems in this case, and to do justice we have to have not only a copy of the testimony with Your Honor's instructions, and we have done everything we possibly can do

"to get that, because attached to our motion for an adjournment today is a Xerox copy of a letter that was written to the court reporter and that letter was written December -- December 7th, and I think it is very important in support of our motion. It is a letter from Mr. Eisenberg to the court reporter, December 7, 1979.
'Dear Madam: My wife ordered a copy of the argument to the jury, together with all of the opening and closing arguments by Mr. Melnick, and my counterclaim. She stated that you were going to call her and inform her of the bill but we have heard nothing from you. Accordingly, I am sending you my check for $500 and ordering the entire transcript, as well as the argument to the jury. If more money is needed, please advise me immediately. Enclosed is a self-addressed envelope for convenience for your reply.' Never heard anything from her. Then we subsequently had correspondence with her about getting out the transcript. She wrote some letters which we have attached some of them. I think they were addressed to the fact that they had taken her off some duties and she had to get out transcripts in adoption cases, and couldn't do anything else. Now that is quite a while ago, and why she hasn't done it, I don't know.
"Now, I submit that this is the case where we certainly ought to have the transcript before we have to argue the motions after verdict, and I don't know what more we can do to get them. I think what should be done, the Court should order her to pro-

"ceed with getting out the transcript ahead of everything else as soon as she humanly can to do so, and to adjourn this case for a short period of time. As soon as we have the transcript - we get the transcript today, we would be ready to argue this case within 72 hours after we get the transcript." (Transcript of Proceeding dated March 7, 1980, p.3-4, App. p.).

The motions after verdict made by the defendant in all but one instance out of 11 motions called for inspection of the record. The trial covered eight volumes of transcripts and was eight days long. Considering this length and in the interest of justice, the motions after verdict could be more fairly determined with the assistance of the transcript.

The Trial Court, as an Appellate Court, is bound by what the records show in the absence of a transcript. DeToro v. DI-LA-CH, Inc., 31 Wis. 2d 29, 142 N.W. 2d 29 (1966). Thus, the motions filed by defendant have to be based on what the affidavits or other records

show with regard to factual matters. The delay necessitated in waiting for the preparation of the transcript would have been well worth the likelihood of error caused by rendering decision on the motions without the recorded transcript. In light of the lengthy trial and the number of factual issues in defendant's motions, defendant asserts the Trial Court abused its discretion in failing to adjourn the post-trial motions until a transcript could be completed. The Appellate Court simply kept giving the reporter more time, repeatedly, to prepare the transcript, until someone ultimately prepared it.

V. THE TRIAL COURT VIOLATED THE DUE PROCESS RIGHTS OF THE DEFENDANT BY ALLOWING PLAINTIFF'S COUNSEL TO REFER TO DEFENDANT AS BEING GUILTY OF MURDER IN THE PRESENCE OF THE JURY

The defendant's past was discussed at length during the trial. At one time he had attempted to assist Judge Krueger, a Milwaukee

Judge, during a desperate time. Shortly thereafter the Judge took his own life, after a newspaper reporter called the Judge and falsely told the Judge he was being removed. The Milwaukee Journal newspaper, which had been at odds with both defendant-appellant and Judge Krueger, intimated that the Judge's death had somehow been brought about due to Mr. Eisenberg's actions. Although this was simply untrue, the jurors were aware of the discussions since many had lived in Milwaukee during the period, and due to the fact this occurrence was discussed at trial. Thus, any reference by plaintiff's counsel to de-defendant being "guilty of murder" had profound implications. Yet during his closing arguments, Mr. Melnick, plaintiff's attorney, addressed the jury as follows:

> "Mr. Eisenberg is not the kind to leave a stone unturned, and he is smart as they come; and he has built an empire

"on the basis of that intelligence and he has gotten away with murder in a sense, not literally, in the sense only how he conducts his affairs, because he is smart." (Transcript of Proceedings December 5, 1979, p. 31, App. p.)

Being a murderer is bad enough; "getting away with it" is as inflaming, insiduous, base, vile and evil as any human being can be accused of. In this case, any possibility of fair play becomes a mockery.

VI. THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS WHEN IT DENIED THE DEFENDANT-APPELLANT HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES TESTIFYING AGAINST HIM.

Procedural due process requires that the defendant confront and cross-examine witnesses against him, particularly where his livelihood is at stake. Willner v. Committee on Character & Fitness, supra.

As is obvious from a cursory reading of the transcript, the primary factual issue in regard to defendant's counterclaim was

what occurred during the Federal Court tax trial, especially in regard to George Crowley's actions and intentions. The defendant was not allowed to question any of the witnesses who were testifying against him.

Although defendant's attorney, Mr. Ray McCann, was allowed to cross-examine these witnesses, this method of cross-examination could not be effective since McCann was not present at the tax trial in Federal Court, and thus could not have experienced the attitude and behavior of George Crowley during the Federal trial. Thus, no real cross-examination was available.

When defendant tried to assist Attorney McCann with his cross-examination, plaintiff's attorney utilized this to distort the factual occurrences at trial, saying, in essence, "How can this man, Sydney Eisenberg, claim he was railroaded into doing things by his

"attorney, George Crowley, when you observed him continually instructing his present attorney, Mc. McCann." Nothing was said about Mr. McCann being in his eighties and hard of hearing, although a very fine decent human being. In reality, George Crowley forced Mr. Eisenberg to sit behind the rail of the courtroom and permitted no communication. Thus, the insinuation made by plaintiff's counsel was totally false.

Beyond that, however, was the fact that defendant's right, under the Constitution, to cross-examine hostile witnesses, was abridged by the Trial Court's refusal to allow him to cross-examine. Any party has a right to cross-examine witnesses who testify against him and this is the cornerstone of the right of confrontation under the United States Constitution. Neider v. Spoehr, 41 Wis. 2d 610, 165 N.W. 2d 171 (1969).

There can be no justice when a litigant is attacked with unsavory, unwarranted accusations and deprived of his constitutional rights.

There can be no justice when instructions given to a jury provided conclusions rather than explanations of law.

There can be no justice when a $14,000 annual income is corrupted into a $900,000 annual income and fed to a jury which was chosen to find the truth as to a question of negligence and the amount of a contract between parties. Passion and prejudice rode rampant.

In the instant case, there was no written contract. The questions should have been determined objectively, dispassionately, and fairly. It certainly was not so determined.

Additional errors were made by the Trial Court. Defendant requested, at the tax trial, that his attorney, plaintiff Crowley, call witnesses as part of his defense. Plaintiff Crowley refused to do so without examining the witnesses. Witnesses were available in the courtroom area for the Federal Court case. They knew defendant had made no entries nor had anything to do with bookkeeping records. Plaintiff Crowley's conduct in refusing to call any of the many bookkeepers available to be called was unreal. Witnesses called in the instant case made it clear throughout their testimony that defendant was in no way, shape, form or manner guilty of any wrongdoing in the tax case.

Since there was no denial of the fact that defendant asked to have his case defended at the conclusion of the I.R.S. Case, plaintiff

Crowley was negligent as a matter of law. Plaintiff was required to defend the motions and allegations involved, to protect defendant's rights, as a matter of law. Defendant at all times claimed to be innocent. Plaintiff Crowley should have thoroughly investigated the case. He did not, obviously.

On page 100 of the Transcript dated November 27, 1979, the following colloquy takes place:

"MR. McCANN: Q Did you ever tell Eisenberg in substance and in effect that you could be in control of the case, and you didn't want him talking as a witness?
(p. 101) "A Of course, yes.
"Q And did you also tell him that you were depending on him to get whatever witnesses he wanted to get?
"A No.
"Q Who was going to get the witnesses?
"A Myself and Mr. Manning.
"Q Can you give me the names of any witnesses that you got and put on the witness stand?
"MR. MELNICK: Objection.
"THE COURT: Sustained. There were no witnesses called.
"(Mr. McCann continues with the cross examination of the witness, George D.

"Crowley."
"MR. McCANN: Q Now, isn't it true that you attended the pre-trial hearing along without your client?
"MR. MELNICK: Objection, asked and answered.
"THE COURT: That objection is overruled.
"THE WITNESS: I attended the pretrial conference in Milwaukee with Judge Harlington Wood with Mr. Manning and myself, Mr. Bukey of the United States Attorney's Office and a second assistant U.S. Attorney. My client was not present in the room. He was sitting outside of the Courtroom
"Q When was he sitting outside of the room?
"A I told him not to come in."

John Zerbel, on page 24 of the November 27, 1979 Transcript, testified that he was present at the tax trial together with Gil Rodney, one of the personnel in his office, who was specifically engaged in handling details regarding the Eisenberg account. Mr. Zerbel testified, on page 23 of said Transcript, they had had no conference with defendant nor his attorney in the case prior to commencement of the trial as to whether or not he was to be a witness. He attended the trial as a

technical observer, together with Mr. Rodney, who was prepared to testify. Neither one was ever called as a witness. He further testified that he was a C.P.A. retained to study the records in preparation for the trial. Although he had examined all of the records involved, and was aware of the fact that the case had been dropped for a whole year, and was aware of all the issues in the case, he was never called as awitness. (page 25 of said Transcrpit) He stated that from an accounting point of view the government did not have a case (page 26). On page 27 he said that the government's case was defective in cases supporting their position, both the net worth and the specific issues. Mr. Melnick objected, and motioned to strike. This very pertinent testimony was stricken by the Trial Judge (page 27). Although he was a certified public accountant being examined

on the issues, his testimony certainly would have been significant as a defense witness at the tax trial. Mr. Zerbel stated that bonds cashed in by defendant had been replaced by him, but this testimony was ruled out by Judge Fiedler. Certainly, this testimony would have cleared defendant at the tax trial, had Judge Wood known or been advised that defendant had cashed in bonds but replaced them immediately with an equivalent value of stocks, Judge Wood would have understood and learned the whole truth rather than being fed misleading statements by the prosecution.

Plaintiff Crowley's refusal to explain an issue involving approximately $250,000 was sheer negligence. It would have taken Plaintiff Crowley no more than twenty minutes or half an hour to prepare the motion for a new trial in the interest of justice within seven

days of the finding by the Judge. Defendant testified Crowley said he would do it. Instead, Crowley drew a motion for a new trial, which probably took half an hour, or, at the most, one hour to prepare. Crowley had nothing whatsoever to do with the Appeal hearing before the Court of Appeals. How is it possible that Plaintiff Crowley would have the effrontery to charge $10,000. 00, or any other similar amount, for a motion for a new trial he could never explain to the jury nor go into in any detail? The answer is obvious. There should have been no Appeal required. Crowley had been paid in full for a job never completed. Crowley never orally argued the motion for a new trial. He charged exorbitantly for a simple motion he never argued. This motion was actually worthless. It was untimely, meaningless and never argued. A charge of $10,000 is unfair and a violation of due process.

VII. PLAINTIFF CROWLEY VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS BY REFUSING TO INTERPOSE A DEFENSE DURING THE CRIMINAL TAX TRIAL OVER DEFENDANT'S OBJECTIONS.

As noted above the right of due process includes the right to present any defense the party may have. Willner v. Committee on Character & Fitness, supra. George Crowley waived this right in defendant's criminal tax trial over the defendant's objection and specifically violated the constitutional rights of defendant in doing so.

As a matter of law, Plaintiff Crowley, in the tax trial, was required to interpose a defense when requested by the defendant. He accepted the duty to properly investigate the case and call the witnesses in the defense of the tax case. Plaintiff maintains he had no such duty. He says he was not required to argue Shellow's motions. Agreements meant nothing to plaintiff. Plaintiff cannot jus-

tify the preparation of the motion from a time standpoint, in any manner. The motion was simply cumulative. There was nothing to argue. He was not only guilty of negligence as a matter of law, but his decision to depart from the case without interposing a defense was irresponsible and reckless. If he felt that plaintiff, United States, had not made out any case whatsoever, after the Court had warned him that the plaintiff had made out a prima facie case, that warning should have stood out like a clarion alarm. Any lawyer-like conduct would have required that he proceed to call defendant's witnesses, including the defendant, himself, all of whom were willing, anxious and able to testify in the case. Plaintiff was guilty of either arrogance or crass negligence in proceeding to drop the defense. Plaintiff admits he heard the defendant tell Judge Wood

he wanted to testify and call witnesses. A motion for a new trial in the interest of justice would have corrected Plaintiff's mistakes. He claims he would have been paid in addition to the sums already paid. Defendant testified he requested such motion. Plaintiff nowhere denies the request was made. Plaintiff not only admittedly entered no defense in the case, defendant never had a fair trial, and when advised defendant was making a claim against Plaintiff, Plaintiff jumped in first with a lawsuit for money he did not earn.

In the course of the trial Mr. Eisenberg stands uncontroverted on his statement reported as follows: (Pages 94, 95 of the Transcript dated November 27, 1979.)

"EXAMINATION BY MR. McCANN:
"Q You have been present during these proceedings in chambers?
"A Yes.
"Q Do you know what has been discussed?

"A Yes.
"Q What is your testimony as to the dates of filing and when they were filed?
"A Before we left the Courtroom I asked Mr. Crowley the same way, exactly like I asked the Judge, and it is in the transcript, to be permitted to testify and have a new trial. I asked Mr. Crowley, 'Please get a new trial in the interests of justice.' And Mr. Crowley said, 'I will.'
"We left the courtroom. I called Mr. Crowley a day or two later. I think this was on Tuesday. I called him within forty-eight hours and said, 'Please remember to get it out.' And he said, 'I got a lot of things to do, but I will get it out.' And I said, 'There is a time limit on it and you got to get it out, because if you get it out I am certain that he will give us a new trial and I can testify.' And he said, 'I will get it out.'
"He didn't get it out, and I kept calling. I talked to Manning. I talked to him. The seven days were gone. He told me that the twenty-day rule applied, because the Judge had said twenty days. But the Judge wasn't referring to that seven-day rule, and he never asked for it. And he didn't ask for it on page ten sixty-four, whatever page he said he did.
"He never asked for it on that page, like he just testified under oath that he did. He never did. And if you look to that page, you will see that he never asked for permission to make the motion. He didn't make any motion, exactly contrary to what he testified.
"And I submit that was wrong. I insisted

"on testifying. I wanted a new trial. I didn't want to lose. He didn't win the case, and he lost, and he wrecked my life."

It was inexcusable for Plaintiff to "mouse-trap" defendant into waiving a jury. The pretrial order of Judge Wood discovered by defendant after the trial was over states that the jury will be waived providing Plaintiff Crowley remains in the case. There was no reason given by plaintiff Crowley for keeping defendant out of the pretrial conference. Obviously he had to get defendant out of the way in order to tell the Judge he was waiving the jury. When defendant entered the trial room for his jury trial, the Court was ready to try a "bench case." Defendant was told to sign a jury waiver. The Trial Judge had been elevated to the Court of Appeals in the interim, and was trying the case to "clean up" his calendar. Defendant had no intention of disturbing or aggravating

Judge Wood, so he signed the waiver. He realized Mr. Crowley was untrustworthy as a lawyer and a human being. But Plaintiff Crowley's conduct became even worse, and the defendant saw his defense deteriorate, and, finally disappear without being heard. He fired Mr. Crowley and retained new counsel to appeal immediately.

VIII. THE SUPREME COURT OF THE STATE OF WISCONSIN VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS OF LAW WHEN IT REFUSED TO REVIEW THE DECISION OF THE WISCONSIN COURT OF APPEALS WHEN SAID DECISION WAS AUTHORED BY HONORABLE LEO HANLEY, A JUSTICE WHO THE DEFENDANT-APPELLANT FILED A TIMELY REQUEST FOR SUBSTITUTION AGAINST WHICH WAS IGNORED.

Due process of law requires that a hearing be held before an impartial tribunal. Such impartiality and guarantees also extend to any appellate procedure where the right to such appeal is granted. District of Columbia v. Clawans, 300 U.S. 617, 81 L. Ed. 843, 57 S. Ct. 660 (1931).

In the case at bar the Court of Appeals was, at the time of this appeal, missing one member and therefore in need of a reserve justice. Upon being notified by the Court of Appeals that said Reserve Justice was to be the Honorable Leo Hanley the defendant immediately filed a timely request for substitution. This request was not only not honored but totally ignored by the Court of Appeals.

Indeed, Justice Hanley not only participated in the decision, but authored it.

Appellant submits that this is a flagrant violation of his right to due process.

CONCLUSION

For all these reasons, in concert, this case should be returned for a new trial and this case merits having a Writ of Certiorari granted by this Court.

APPENDIX

Decision of Supreme Court of Wisconsin - December 7, 1981 A1

Decision of Court of Appeals of State of Wisconsin - July 21, 1981 A3

Order For Judgment - Circuit Court Milwaukee County, Wisconsin - March 17, 1980 A20

Partial Trial Transcript A23

Office of the Clerk - Supreme Court - State of Wisconsin.

To: David A. Melnick
Jacobson, Sodos, Melnick & Krings
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Sydney M. Eisenberg
1131 West State Street
Milwaukee, Wisconsin 53233

Ray T. McCann
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53233

Madison, December 7, 1981

Hon. James P. Fiedler
Circuit Court of Iowa County
County Courthouse
Dodgeville, Wisconsin 53233

The Court today announced an order in your case as follows:

No. 80-737 Crowley v. Eisenberg

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Sydney M. Eisenberg, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

MARILYN L. GRAVES

Clerk of Supreme Court

COURT OF APPEALS - DECISION - DATED AND RELEASED July 21, 1981. A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 80-737

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

GEORGE D. CROWLEY

Plaintiff-Respondent

v.

SYDNEY M. EISENBERG

Defendant-Appellant

APPEAL from a judgment of the circuit

court for Milwuukee County: JAMES P. FIEDLER, Judge. Affirmed.

, Before Decker, C.J., Cannon, J., and Hanley, Reserve Judge.

HANLEY, Reserve Judge. This appeal arises out of an action commenced by George D. Crowley (respondent herein), to recover attorney's fees owing from his representation of Sydney M. Eisenberg (appellant herein), in a federal criminal trial where it was found that Mr. Eisenberg was guilty of three counts of willfully filing a false income tax return. Mr. Eisenberg counterclaimed against Mr. Crowley for legal malpractice.

On December 5, 1979, a jury found for Mr. Crowley on his claim for attorney's fees, and against Mr. Eisenberg on the malpractice counterclaim.

After hearing motions after verdict, the trial judge ruled that there was credible

evidence to support the verdict answers, with the exception of the answer to question 1a, regarding the amount owed by Mr. Eisenberg for Mr. Crowley's legal services, which was amended by stipulation from $10,000 to $7,000. Judgment was ordered against Mr. Eisenberg on March 17, 1980. The counterclaim was dismissed on the merits. Mr. Eisenberg appeals.

The following issues are presented on this appeal:

1. Were the motions after verdict timely filed by the respondent in his defense of the appellant in the criminal case?

2. Were the instructions submitted by the trial court to the jury erroneous?

3. Was the special verdict submitted to the jury erroneous?

4. Did the trial court err in refusing to adjourn the motions after verdict until a

transcript had been prepared?

5. Did the trial court err in not ordering a new trial based on an improper closing argument by respondent's counsel?

6. Did the trial court err in refusing to allow the appellant to conduct his own cross-examination?

7. Is there any credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant?

Timeliness of Motions

Appellant contends that the trial court erred in ruling, as a matter of law, that respondent's motions after verdict, on behalf of appellant in his criminal trial, were timely flied.

Although the appellant raised eleven separate issues in his post-trial motions, the issue of the appropriateness of the trial

court's ruling on the timeliness of respondent's motions after verdict was never raised.

The Wisconsin Supreme Court has consistently held that to preserve a right to appeal, one must first raise the issue in the trial court. The burden is upon the party that alleges error to establish in the record that the error was specifically called to the attention of the trial court. A failure to make a timely objection constitutes a waiver of the objection. Terpstra v. Soiltest, Inc., 63 Wis. 2d 585, 594, 218 N.W. 2d 129, 134 (1974).

Pursuant to the above authority we hold that the issue is not properly before this court.

Instruction Regarding Newspaper Article

The appellant has alleged that the jury was not properly instructed regarding a newspaper

article concerning him which appeared in The Milwaukee Journal during the course of the trial. However, he has failed to incorporate the article in the record on this appeal. He is requesting the court to overturn a jury verdict and a decision of the trial court without submitting the article to the court.

In Nimmer v. Purtell, 69 Wis. 2d 21, 230 N.W. 2d 258 (1975), the court considered the contention of a party that opposing counsel had made an improper argument to the jury. No record was made of the final arguments, however, and the court stated:

> [W]ith no record this court cannot determine whose recollection of what was said is correct. The rule in Wisconsin is that absent some showing somewhere in the record, the court cannot consider the alleged error. Borowske v. Integrity Mut. Ins. Co., (1963) 20 Wis. 2d 93, 98, 121 N.W. 2d 287. Purtell, 69 Wis. 2d at 40, 230 N.W. 2d at 268.

The appellant made no request for any instruction regarding the newspaper article.

He made no suggestion to the trial court other than to ask the jury if they had read the article and to instruct that they pay no attention to it.

The court did question the jury and nine members stated that they had read the article. On individual questioning by the trial court, all nine responded that they could put the article out of their minds in reaching a verdict.

If the appellant wanted anything additional he should have requested it at the time. If he felt that the article was damaging and the poll of the jury insufficient, he should have made an objection and moved for a mistrial. He elected to take his chances on a jury verdict.

In Micke v. Jack Walters & Sons Corp., 70 Wis. 2d 388, 392, 234 N.W. 2d 347, 349 (1975), the Court stated:

> There is no evidence or indication in this record that the defendant corporation requested such specific instruction when the case was submitted to the jury. Therefore error cannot be predicated upon the omission. As this court has held: "Where instructions are incomplete, and do not cover a point that ought to be covered, this court will not reverse unless a timely request for appropriate instructions has been made to the trial court." (Quoting Grinley v. Eau Galle, 274 Wis. 177, 179, 79 N.W. 2d 797, 798 (1956)).

Here an instruction conference was held by the court in chambers, and the proposed jury instructions were approved by counsel for the parties.

We conclude that appellant's failure to object to the instructions precludes him from raising an objection to the instruction on this appeal.

The appellant also argued that the jury was not properly instructed on the difference between his gross income and his net income. Defendant's income record was a factor in establishing his damages.

Appellant himself, through the questioning of his attorney, referred to his 1975 Income Tax return.

He was then questioned by respondent's attorney, Mr. Melnick:

> Q I show you what has been marked as plaintiff's exhibit 16, which purports to be the tax return of Eisenberg subsidiaries and ask you doesn't the gross receipt show nine hundred thousand seventy six dollars and seventy one cents?
>
> A It is not from law practice.

The return was admitted into evidence without objection. At no time was a motion for a mistrial made. Appellant also failed to submit an instruction to the court. In ruling on a similar issue in Lipinski v. Pakulski, 62 Wis. 628, 633-34, 215 N.W. 2d 468, 471 (1974), the court said:

> After the jury was instructed, the trial judge asked the lawyers for both plaintiff and defendant whether they had any corrections to make or whether there had been any omissions. Both stated that they were satisfied with the

instructions as given.

> Under these circumstances, an appellant is precluded on appeal from arguing that other additional instructions should have been given. The instructions that were given were not erroneous. Even under the plaintiff's theory of the case, the most that could be said is that they were incomplete. We have however, repeatedly stated:
>
> "Where instructions are incomplete and do not cover a point that ought to be covered, this court will not reverse unless timely request for appropriate instructions has been made to the trial court. Grinley v. Eau Galle, (1956), 274 Wis. 177, 79 N.W. 2d 797." Carson v. Pope, (1961), 15 Wis. 2d 300, 306, 112 N.W. 2d 693 [,696.]

We hold that the appellant waived any alleged error in the trial court's instructions to the jury by not objecting to the instructions given or offering his own additional instructions.

Form of Special Verdict

Appellant contends that the form of the special verdict was erroneous. Neither at the time the special verdict was presented to

counsel nor in his motions after verdict did the appellant raise the issue he raised on appeal. Both attorneys for the parties agreed with the court on the form of the special verdict as submitted to the jury.

In Roach v. Keane, 73 Wis. 2d 524, 243 N.W. 2d 508 (1976), the court was faced with an almost identical situation. There the appellant also failed to object to the special verdict before it was submitted to the jury, and neglected to raise the issue on motions after verdict. The court held that under these circumstances, there can be no question that the defendant is not entitled to assert error on appeal. Id. at 535, 243 N.W. 2d at 515.

We conclude the appellant is precluded from complaining now about the special verdict form.

Adjournment of Motions After Verdict

Appellant asserts that the trial court abused its discretion in failing to adjourn the post-trial motions until a transcript could be completed. However, he fails to show with any degree of specificity what particular error the trial judge made in ruling on the post-trial motions because a transcript was not available to him at that time.

Appellant has not shown any prejudicial effect due to the transcript not being available to the trial court. Appellant has not asked for any particular relief in his brief because of this alleged error.

Under the circumstances we conclude that the trial court did not abuse its discretion in refusing to adjourn the motions after verdict until the transcript was available.

Closing Argument of Counsel

The appellant claims that counsel for

the respondent, in his closing argument, referred to appellant as "being guilty of murder." The claim is misleading and incorrect. The record discloses that respondent's counsel, in his closing argument, stated to the jury:

> Mr. Eisenberg is not the kind to leave a stove [sic] unturned and he is smart as they come; and he has built an empire on the basis of that intelligence and he has gotten away with murder in a sense, not literally [i]n the sense only how he conducts his affairs; because, he is smart. Transcript of December 5, 1979 at 30-31

At no time was any objection or a motion for a mistrial made by the appellant.

In Zweifel v. Milwaukee Automobile Mutual Insurance Co., 28 Wis. 2d 249, 256, 137 N.W. 2d 6, 11 (1965), the Court held that if particular arguments were thought improper, it was incumbent upon counsel to move for a mistrial before the jury returned its verdict or else the complaint was deemed waived.

We hold the appellant waived any alleged error in the closing argument by failing to move for a mistrial.

Cross-Examination of Witnesses

The Appellant now, for the first time, has raised an issue of whether it was error for the trial court to deny him an opportunity to cross-examine witnesses.

There is nothing in the record indicating that a request was made to the trial court to permit appellant to conduct cross-examination. His attorney, Mr. McCann, was allowed to cross-examine witnesses. Appellant has cited no authority that both a party and his attorney can conduct cross-examination.

The absence of a request to the court on the record and the absence of this issue on motions after verdict are fatal to the appellant. As the court said in Platta v. Flatley, 68 Wis. 2d 47, 63, 227 N.W. 2d 898, 907 (1975):

"The plaintiff alleges prejudicial error on the part of the trial court in not permitting the plaintiff to pursue certain lines of cross-examination. Not only are the plaintiff's allegations of error unclear but they are not raised on posttrial motions. The objection comes too late."

We refuse to consider this issue which is raised for the first time on appeal.

Question of Credible Evidence

Section VII of the appellant's brief sets forth his version of the facts which he was not able to prove to the satisfaction of the court or jury.

Both Mr. Crowley and Mr. Manning testified about the trial strategy, the fact underlying the jury waiver by appellant, and the decision not to call appellant as a witness.

The appellant has not presented a proper issue for appeal in this section. All of his

contentions were controverted by respondent's experts. His experts were controverted by respondent's experts. The standard for overturning a jury verdict on a factual question is well established. In Meurer v. ITT General Controls, 90 Wis. 2d 438, 450-51, 280 N.W. 2d 156, 162-63 (1979), the court said:

> The standard of review of a jury verdict is that it will not be upset if there is any credible evidence to support it. The evidence will be viewed in the light most favorable to the verdict. May v. Skelley Oil Co., 83 Wis. 2d 30, 35, 264 N.W. 574 (1978); Nelson v. Travelers Ins. Co., 80 Wis. 2d 272, 282, 283, 259 N.W. 2d 48 (1977). This is especially true where, as here, the verdict has the approval of the trial court. Upton v. Tatro, 68 Wis. 2d 562, 570, 229 N.W. 2d 691 (1975). The credibility of witnesses and the weight given to their testimony are left to the judgment of the jury, and where more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the jury. Roach v. Keane, 73 Wis. 2d 524, 536, 243 N.W. 2d 508 (1976). On Appeal the obligation of this court is to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury

could have but did not reach. Coryell v. Conn, 88 Wis. 2d 310, 317, 276 N.W. 2d 723 (1979).

Under the above standards of review we are satisfied that there is ample credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant in the tax case. The judgment is correct and must be affirmed.

By the Court - Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

GEORGE D. CROWLEY

Plaintiff

ORDER FOR JUDGMENT

vs.

Case #455-500

SYDNEY M. EISENBERG

Defendant

The above captioned matter having come on for jury trial on the 26th day of November, 1979, and the jury having rendered it's verdict on the 5th day of December, 1979; counsel for the parties having prepared and filed their respective motions after verdict, and having appeared for oral arguments on the 7th day of March, 1980, the plaintiff appearing by his attorneys, Jacobson, Sodos, Melnick and Krings, S.C., by David Melnick and Alan Derzon, the defendant appearing by his attorney, Ray T. McCann; and the Court having heard argument, considered the evidence of-

fered at the trial herein, and determined that there was credible evidence in the record to support the verdict answers with the exception of the answer to Question 1a which has been amended by the stipulation of counsel from Ten Thousand Dollars ($10,000.00) to Seven Thousand Dollars ($7,000.00),

NOW, THEREFORE, upon all the records, files and proceedings herein,

IT IS ORDERED:

1. That the Plaintiff be granted judgment against the defendant in the sum of Fourteen Thousand Eight Hundred and Thirty-Eight Dollars ($14,838.00) with interest thereon at the rate of 7% per annum together with their costs and disbursements.

2. That the counterclaim of the defendant against the plaintiff shall be dismissed upon the merits.

Let judgment be entered accordingly.

Dated this 17th day of March, 1980.

BY THE COURT:

/s/
James P. Fiedler
Circuit Court Judge

a motion.

Q You disagree with the Judge's decision in the case?

A No, no.

Q What did he say about filing the motions?

THE COURT: Just one minute.

(Conference in chambers.)

THE COURT: Let the record show this is a conference held in the absence of the jury. Present are both counsel and both parties to this action. The Court has concluded that the questioning by Mr. McCann, both of Mr. Manning and of Mr. Crowley, relate to the motion filed with the Federal Court on the grounds for a new trial on the grounds of newly discovered evidence, has been completely misleading.

I have read Defendant's Exhibit Two, which was received in evidence yesterday, and

which constitutes the decision of Judge Wood relating to those motions. And at page fifteen and sixteen Judge Wood differentiates between the timely filing of that motion for different reasons than what is appearing before this jury.

At page fifteen at the bottom thereof Judge Wood uses this langugage: "If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict or a finding of guilty," and at the top of page sixteen, "is to be granted when in the interests of justice."

He goes on to state that a motion for new trial based upon newly discovered evidence may at the end of a seven day period would be granted and conditions that he then there lists. That's entirely different from the impression that is being given to this jury on the basis of these questions.

These questions by Mr. McCann to both of these witnesses has been designed, it seems to me, to make it appear that the motion was not timely filed, and that is not the fact based on Judge Wood's decision.

Now, I want the suggestions of counsel, starting with Mr. Melnick, as to how that can be cleared up.

Mr. Melnick?

MR. MELNICK: I think that -- I think an order from the Court indicating the facts and circumstances, indicating that the jury disregard the questions that came before, and make the statement simply the way the Court had made it in chambers would clarify the situation so we don't have any further problems, and hopefully the questions like that won't come up again.

THE COURT: Mr. McCann.

MR. McCANN: I think the questions

that were asked were proper questions, and Mr. Manning himself said he disagreed to the Judge's decision.

Q Where on page eleven forty-six?

A I just read it, Mr. McCann.

Q Now, that rule refers to a written motion, does it not?

A I don't see it written in here at all.

MR. MELNICK: I am going to move that this all be stricken.

THE COURT: The Defendant's Exhibit Two, which has been identified as post-trial motions of the Defendant there is a filing stamp of the U.S. District Court of December 10, 1976, the judgment or -- strike that.

The date of sentencing, June 20th, 1976. Defendant's Exhibit Eight, which has been received in evidence, relates to the Federal Rules and provides for the filing

of a motion based on newly discovered evidence within two years after judgment, and further provides that a motion for a new trial based on any grounds other than newly discovered evidence must be within seven days after verdict or finding of guilty such further time as the Court may find during the seven-day period.

The only motion filed on behalf of the Defendant for a new trial was that on the grounds of newly discovered evidence. The Court finds as a matter of law that was timely filed. The objection is sustained. This evidence is irrelevant.

Proceed.

recall his testimony, I am sure. At any rate you are to completely disregard the testimony of Frieda Scheuer, who testified yesterday, has been ordered stricken; and you are to totally disregard the testimony of Mrs.

Scheuer. Finally, Members of the Jury, it has been called to my attention that the article appeared in Milwaukee Journal concerning Mr. Eisenberg. Did any of you read that article? If so, would you raise your hand up, please. Let the record show that nine members of the Jury Panel have indicated that they read that article and that neither of the alternates indicated that they did. I will address my remarks to the nine of you who have read the article. Are there any of you who cannot completely put that article out of your mind in reaching your verdict? Let me -- in the back row, now, Mrs. Budish, you indicated that you read the article.

JUROR: Yes.

THE COURT: Do you feel, Mrs. Budish, that you can put that article out of your mind in reaching this verdict?

JUROR: It has nothing to do with this

case.

THE COURT: Horvat, Mr. Horvat, you have indicated that you read the article. Can you put the article out of your mind in reaching a verdict?

JUROR: Yes.

THE COURT: May I have your name?

JUROR: Schneider.

THE COURT: Mrs. Schneider, you have indicated that of what Ray is going to say. I wish you would hold your decision on that for the moment, because of what Ray is going to say. I -- the reason why I thought I might argue for fifteen minutes.

THE COURT: Mr. McCann.

MR. McCANN: In last night's Journal there is an article here in the Accent Section. There is a document; "Eisenberg Suspension Appeal to Court." Why that's in last night's paper, I -- don't know; because

that appeal was filed, I think, about a week or ten days ago and why they did it -- Of course, they got a right to do it. I wonder if the Court shouldn't ask the Jury whether they read it and pay no attention to it.

THE COURT: Mr. McCann, I have read the article, now. What suggestion are you making?

MR. McCANN: Well, it's a little difficult to tell, because we don't know how many read it or if any of them read it. It seems to me, without emphasizing the article, there ought to be some general instruction not to pay any attention to anything in the newspapers.

THE DEFENDANT: May I add something.

THE COURT: All right.

THE DEFENDANT: This is a situation -- First of all, the article is incorrect as to reporting of it. The only -- Your Honor, I wasn't planning to go into long testimony on

the case and I wasn't planning to argue until we saw this in the paper. There are certain things that have to be read to the Jury to get the record straight that are in evidence. I don't intend to go outside of the evidence, nor would I do anything to bring about an objection. I am not going to; if he wants to object, he can.

THE COURT: I have ruled that you may argue.

THE DEFENDANT: On this thing, we were talking about how to correct it. We don't want to move for a mistrial. We don't know what damage was done and so forth; and we thought -- and this -- I don't know how Your Honor would think it could be handled; but, if, for example, the Jury were simply asked did they -- raise your hand if you read the article, that would be one indication to you.

THE COURT: Suppose all fourteen raise their hand, what am I suppose to do?

THE DEFENDANT: If they did read it, I would assume -- I don't know, I don't know. I thought this, Judge --

THE COURT: I will handle it.

THE DEFENDANT: Let me just suggest this, what Mr. McCann said; if they did read it, we get instruction; and, if I were to read from evidence, from the matters in evidence to the Jury so that they at least -- I could describe, try to show what happened, believe the Journal or believe the evidence.

THE COURT: I will handle that article.

(End of instruction conference.)

* * *

THE COURT: Good morning Members of the Jury. We are in the last phases of this trial and I know most of you have never ....

....

A On the telephone and in person, several discussions.

Q In person, September of 1975?

A First on the telephone and then in person.

Q When in person, Mr. Eisenberg?

A I would say that I first went to see him in September of 1975.

Q In September or December?

A Oh, no, September.

Q Now, what was your understanding in September of 1975 as to what you fee agreement was?

A I understood -- what was my understanding?

Q Yes, sir.

A As a result of what was said or what I concluded?

Q What is your understanding of what that agreement was?

A My understanding was after discussion that

I was to pay Twenty Thousand Dollars for the trial and including the Court of Appeals if I had to go there; but if I had to go to the Court of Appeals, I had to add Three Thousand Dollars for briefs. Then I was to pay Thirty Thousand Dollars to go all the way through, if I had to go to the United States Supreme Court, including the petition for certiorari. If the case was dismissed on motions, which Mr. Crowley agreed to handle, I am trying to be responsive if I may, then only Ten Thousand Dollars.

Q Well, now, the motions were brought sometime in November

....

....

MR. McCANN: This motion is to have the argument on behalf of the verdict adjourned until we can get a copy of the testimony. Now, there are quite a few problems in this case and to do justice we have to have not only a copy of the testimony with Your Honor's instructions and we have done everything we possibly can do to get that because attached to our motion for an adjournment today is a xerox copy of a letter that was written to the court reporter and that letter was written December -- December 7th and I think it's very important in support of our motion. It's a letter from Mr. Eisenberg to the court reporter, December 7, 1979. "Dear Madam: My wife ordered a copy of the argument to the jury together with all of the opening and closing arguments by Mr. Melnick and my counterclaim. She stated that you

were going to call her and inform her of the bill but we have heard nothing from you. Accordingly, I am sending you my check for $500 and ordering the entire transcript as well as the argument to the jury. If more money is needed, please advise me immediately. Enclosed is a self-addressed envelope for convenience for your reply." Never heard anything from her. Then we subsequently had correspondence with her about getting out the transcript. She wrote some letters which we have attached some of them. I think they were addressed to the fact that they had taken her off some duties and she had to get out transcripts in adoption cases and couldn't do anything else. Now, that's quite a while ago and why she hasn't done it, I don't know.

Now, I submit that this is the case where we certainly ought to have the transcript before we have to argue the motions after

verdict, and I don't know what more we can do to get them. I think what should be done, the Court should order her to proceed with getting out the transcript ahead of everything else as soon as she humanly can do so and to adjourn this case for a short period of time. As soon as we have the transcript -- we get the transcript today, we would be ready to argue this case within 72 hours after we get the transcript. Without the transcript, there's going to be dispute as to what was said.

Now, as for one instance, there will be a dispute probably on this: At one time the defendant was referred to as a murderer. Now, I don't care what he is or what he will be. He's not a murderer. This is just one example I might point out, and there's some other things according to my notes and I don't claim to be the greatest notetaker in the world,

but it refreshes my recollection but I want to have the exact language and the circumstances under which it was said. We have -- I am not doing this for purposes of delay because what little experience I have had in the practice of law, the longer a case is in your office before you terminate it

...

Office - Supreme Court, U.S.
FILED
JUL 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2129

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SYDNEY M. EISENBERG,

Petitioner

vs.

GEORGE D. CROWLEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Ruled As A Matter Of Law That Respondent George Crowley Filed A Motion After Verdict In The Petitioner's Federal Tax Case In A Timely Manner?

   Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to post-judgment motions.

2. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Purportedly Rendered Erroneous Instructions To The Jury? Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to instructions.

3. Did The Trial Court Violate Petitioner's Right to Due Process Of Law Under The United States Constitution When It Purportedly Rendered A Verdict Form Containing Assumed

Facts In Dispute And Therefore Invaded The Province Of The Jury?

Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to verdict form.

4. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Refused To Adjourn Motions After Verdict Until A Transcript Could Be Prepared?

Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to adjournment of motions.

5. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Purportedly Allowed Respondent's Counsel To Refer To Petitioner As Being Guilty Of Murder In The Presence Of The Jury?

Neither The Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to an alleged improprietous statement.

6. Did the Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Purportedly Denied Petitioner His Constitutional Right To Confront Witnesses Testifying Against Him?

   Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to confrontation of witnesses.

7. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Refused To Over Turn The Jury Verdict Finding No Malpractice?

   Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to purported acts of malpractice.

8. Did the Supreme Court of the State of Wisconsin Violate Petitioner's Right To Due Process Of Law When It Refused To Review the Decision Of The Wisconsin Court of Appeals, Said Decision Having Been Authored By A Justice Against Whom Petitioner Filed A Request for Substitution?

The Wisconsin Supreme Court was never presented with nor passed upon any constitutional issue with respect to a substitution request.

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JURISDICTIONAL STATEMENT

The respondent contends that jurisdiction for granting of certiorari in the instant case is not founded in Title 28, §1257 (3) of the United States Code nor in any other authority recognized by law.

CONSTITUTIONAL PROVISIONS

Respondent contends that the privileges and imunities, citizenship, equal protection, apportionment of representatives, disqualification of officers, public debt and enforcement provisions of the United States Constitution are inapplicable to the case at bar and have not been raised by the petitioner in argument or by reference.

STATEMENT OF THE CASE

This action was commenced by the respondent, George D. Crowley, to recover attorney fees owing from his representation of the petitioner, Sydney M. Eisenberg, in a federal criminal trial where it was found

that Mr. Eisenberg was guilty of three (3) counts of willfully filing a false income tax return. The petitioner counter-claimed against the respondent for legal malpractice.

A jury trial was commenced in Milwaukee County Circuit Court on November 26, 1979, before the Honorable James P. Fiedler. On December 5, 1979, the jury found for the respondent on his claim for attorney fees and against the petitioner on his counter-claim.

On March 7, 1980, motions after verdict were argued before the Honorable James P. Fiedler. (A13-15) The Court heard the arguments of counsel, considered the evidence offered at the trial and determined that there was credible evidence to support the verdict answers, with the exception of the answer to Question 1a which was amended by stipulation of counsel from $10,000 to $7,000. Judgment was ordered against the

petitioner on march 17, 1980, in the sum of $14,838.00 with interest at the rate of 7% per year, together with costs and disbursements. The counterclaim of the petitioner was dismissed on the merits. (A17-18) From this judgment the petitioner appeals.

The petitioner contended that his retainer agreement with the respondent was for a fee of $20,000 to cover trial and appeal. If an appeal was necessary, $3,000 additional would be paid for the printing of briefs.

The respondent testified that the retainer agreement called for a $30,000 fee to cover the trial. (R., 11/27/79, 37). He was also to be paid his expenses in addition. (Id. at R. 38). The respondent testified that the agreement for post-trial representation called for an hourly rate and that Mr. Eisenberg agreed to this. (Id. at R. 43).

The petitioner claimed Mr. Crowley had committed malpractice by his waiving a jury

without consultation with him; that Mr. Crowley had failed to properly investigate the case; that he refused to allow the petitioner to testify; that he failed to call any witnesses for the defense; and that he filed his post-trial motions late.

Mr. Crowley and his associate, Mr. Manning, both testified and refuted all of petitioner's contentions. Mr. Manning testified that a waiver of a jury was discussed with Mr. Eisenberg, and that Mr. Eisenberg agreed to a trial before the Court. (R., 11/26/79, 37, 79-80). Mr. Eisenberg signed a jury waiver in open Court. (Id. R. 114).

Mr. Manning testified that the reason no witnesses were called by the defense was that the government had called all the pertinent witnesses and the defense had the opportunity to question them through cross-examination. (Id. R. 117). Both Mr. Crowley and Mr. Manning testified that they had investigated the case and interviewed witnesses. (Id. R. 67-68; 11/27/79, 51-53).

The respondent also refuted Mr. Eisenberg's claim that he was not permitted to testify. Mr. Manning gave his reasons why he did not want Eisenberg to testify. (R. 11/26/79, 106-107). He also testified that this strategy was discussed with Eisenberg. (Id., 92-95). Mr. Crowley supported Mr. Manning's testimony and said that he had discussed with Eisenberg whether he should testify and it was agreed that Eisenberg would not take the witness stand. (R. 11/27/79, 68).

Mr. Manning testified that after the government rested its case there was a recess. When Mr. Crowley and Mr. Manning returned to the Courtroom, Mr. Eisenberg was standing before the bench and was telling the judge that he was ready to testify and that the Court need not wait for his attorneys. (R. 11/26/79, 81-82). Mr. Manning said that Eisenberg did this to give the Court an impression of candor without being

subjected to cross-examination. (Id. 109) (R. 11/27/79, 19).

At the conclusion of the government's case in the criminal trial, the defense made a motion for a judgment of acquittal, which was denied. The defense put into evidence various documents, rested, and again made a motion for a judgment of acquittal. Mr. Manning testified that after the first motion the Court had to view the evidence in a light most favorable to the prosecution. After the second motion the standard became one of beyond a reasonable doubt. (Id. 7-8). Both Stanley Gimbel and James Shellow, two Milwaukee attorneys with extensive experience in federal criminal tax matters, supported this strategy used by Mr. Crowley. (R. 12/4/79, 75-76, 87-88, 93-94).

The petitioner also claimed that Mr. Crowley failed to timely file post-trial motions. The motion referred to was a motion for a new trial based on newly dis-

covered evidence. Mr. Manning testified that this new evidence was not discovered until approximately two weeks after Eisenberg had been found guilty. (R., 11/26/79,89-90). Mr. Manning testified that the federal trial judge ruled that the motion must be viewed under a more stringent standard than would be required had the motion been brought within the seven days of a finding of guilt. The Trial Court in this action, with no evidence available to the respondent within seven days of Mr. Eisenberg's being found guilty ruled as a matter of law that the motion was timely filed.

As hereinbefore stated, the jury, after hearing all of the evidence, arguments of counsel, and argument from Mr. Eisenberg, found for the respondent on his complaint and against the petitioner on his counterclaim.

The judgment herein was reviewed by the Wisconsin Court of Appeals and affirmed in its entirety and judgment entered July 21, 1981 (A1-12)

Mr. Eisenberg sought a discretionary Petition for Review before the Wisconsin Supreme Court which was denied by order entered December 7, 1981 (A. 16). From the denial of Petition for Review Mr. Eisenberg has filed the instant Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENTS

Petitioner herein maintains that the Trial Court, Appellate Courts and respondent denied him Due Process of law by various acts during the course of litigation of the action below and subsequent proceedings. Respondent will argue that the petitioner has not properly raised a federal question so as to confer jurisdiction upon the Court. The petitioner failed to preserve any constitutional argument at the Trial Court level and accordingly would be precluded from review by Writ of Certiorari before the United States Supreme Court. Mr. Eisenberg neglected to preserve many of the issues in any form by refusing to object,

preserve the record, or move for mistrial. The Court of Appeals for the State of Wisconsin refused to consider any of Mr. Eisenberg's arguments in that they were waived at the trial level. Petitioner requests the Court to consider now, through Writ of Certiorari, purported issues of constitutional magnitude without having presented the same to the Courts below.

Respondent will further demonstrate that the allegations of Due Process denial are substantively without merit, assuming for the sake of argument that they are properly before the Court. The jury verdict below was founded upon adequate and independent grounds and any purported errors did not result in a denial of the petitioner's Due Process rights. The respondent will attempt, by reference to the decision in the Trial Court, post-judgment motions, the record, and other exhibits to illustrate that the averments by petitioner are wholly without

merit. Respondent herein will request the Court, periodically, to disregard a substantial portion of petitioner's argument in that it is unsupported in law and by reference to the record.

ARGUMENT

I. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT RULED AS A MATTER OF LAW THAT RESPONDENT GEORGE CROWLEY FILED A MOTION AFTER VERDICT IN THE PETITIONER'S FEDERAL TAX CASE IN A TIMELY MANNER?

Petitioner argues that the Trial Court erred in ruling as a matter of law that respondent's motions were filed in a timely manner. Although petitioner attacks both respondent and the Court, personally and substantively, no references to the record are made. Petitioner occasionally quotes from what may be the record in the trial below but fails to cite its appropriate page. The majority of the "argument" is fraught with unsupported averments and should be disregarded: e.g., "This request was made when the Court appeared to be sympathetic to the taxpayer's statement to the Court letting the judge know he wanted an opportunity to take the stand and explain the facts." (Pet.Br. 25) ";. . . Mr. Crowley procrastinated until the seven (7) days were up and over." (Pet.Br. 26) "Mr. Crowley was simply in a hurry to leave Milwaukee." (Pet.Br. 28). The Court has been presented

for the first time with an unsupported claim of constitutional dimension.

The Wisconsin Court of Appeals correctly ruled that "to preserve a right to appeal, one must first raise the issue in the Trial Court." (A.3) The failure to do so "constitutes a waiver of the objection." (A.3) Terpstra v. Soil Test, Inc., 63 Wis.2d 585, 594, 218 N.W.2d 129, 134 (1974). The Wisconsin Supreme Court has repeatedly ruled that no evidentiary ruling is reviewable as a matter of right without first being raised in motions after verdict, Michalski v. Wagner, 9 Wis. 2d 22, 100 N.W.2d 354 (1960), Dutcher v. Phoenix Ins. Co., 37 Wis. 2d 591, 155 N.W.2d 607 (1968). The allegation of a due process violation was never raised at the trial level. Moreover, petitioner failed to preserve such issue at post-judgment level. (A13-15) With respect to the timeliness issue, petitioner failed to object under any grounds, either at trial or through post-judgment motions. No constitutionally couched argument has ever been put forth until the filing of the instant Petition for Writ of Certiorari.

The United States Supreme Court has had a correlative approach in viewing constitutional issues raised on appeal. Only constitutional issues raised in the lower Court shall be considered by the Supreme Court on appeal. Shelley v. Kraemer, Mich. & Mo., 334 U.S. 1, (1948), State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 154 (1945) Re-hearing Denied 444 U.S. 1088 (1979, Fuller v. Oregon, 471 U.S. 40 (1974), Cardinal v. Louisiana , 394 U.S. 437 (1969, Monk v. New Jersey, 398 U.S. 71 (1970).

Accordingly, respondent maintains that no federal question is properly before the Court. The Supreme Court has not in the past, and should not now, review that which the Court below did not decide. Walters v. City of St. Louis, 349 U.S. 231 (1954).

In no way does petitioner demonstrate a violation of due process rights nor does he present any evidence of resultant harm. He cites no case law or evidentiary support to lend credence to his bold faced assertion. The Supreme Court will not rule upon issues of purported constitutional dimensions which are hypotheti-

cal. Ashbury Hospital v. Cass County, N.D., 326 U.S. 207 (1945) Further, a mere assertion of a claim of federal question, as in the case at bar is inadequate to confer jurisdiction upon the Court. U.S. Fidelity & Guaranty Co. v. State of Oklahoma, 250 U.S. 111 (1919), Hamblin v. Western Land Co., 177 U.S. 531 (1893), and Thomas v. Iowa, 209 U.S. 259 (1908). The denial alleged to have occurred must be distinct and positive in order to support jurisdictional sufficiency. Michigan Sugar Co. v. Michigan, 185 U.S. 112 (1902).

The United States Supreme Court has refused to review State Court decisions which are founded upon independent and adequate state grounds, even when the judgment decided federal questions. That principal applies to cases involving both substantive and procedural grounds. Henry v. State of Mississippi, 379 U.S. 443 (1965) Re-hearing Denied 380 U.S. 926, On Reversal 174 So.2d 348, Motion Denied 381 U.S. 908. The instant action was decided upon independent and adequate grounds. The jury determined that petitioner committed

no act of legal malpractice. In Wisconsin the standard for review of a jury verdict;

> "Is that it will not be upset if there is any credible evidence to support it. The evidence will be reviewed in the light most favorable to the verdict." Meurer v. ITT General Controls, 90 Wis.2d 438, 450-451 280 N.W. 2d 146 162-163 (1979)

The Court of Appeals in the case at bar, and as affirmed by the Wisconsin Supreme Court ruled,

> "Under the above standards of review, (supra) we are satisfied that there is ample credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant in the tax case. The judgment is correct and must be affirmed." (A. 11-12)

No federal question was presented to the Trial or to the Appellate Courts. The jury verdict was found to be adequate and accordingly no procedural or substantive issue with respect to the timely filing of motions is properly before this Court.

II. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY RENDERED ERRONEOUS INSTRUCTIONS TO THE JURY?

Mr. Eisenberg claims that the Court denied his right of Due Process by failing to give two instructions, one relating to adverse publicity and the other differentiating between gross and net income. As is the case in the majority of arguments put forth by the petitioner, the Court is not provided with the benefit of specific citations from the record or substantiation in other form. Respondent again requests the Court, as it will continue to do during the balance of the response, to disregard unsupported and uncited allegations. Petitioner, in fact, failed to incorporate the newspaper article to which he refers, into the record. In Nimmer v. Purtell, 69 Wis.2d 21 230 N.W.2d. 258 (1975), the Court considered the contention of a party that opposing counsel had made an improper argument to the jury. No record in that action was made of the final arguments, however, and the Court stated at P. 40,

> ". . .with no record this Court cannot determine whose recollection of what was said is correct. The rule in Wisconsin is that absence of showing somewhere in the record the Court cannot consider the alleged error." Borowske

v. Integrity Mutual Ins. Co., (1963) 20 Wis.2d. 93, 98, 121 N.W.2d 287 Purtell, 69 Wis.2d. at 40, 230 N.W.2d at 268.

A search of the record reveals that petitioner failed to request either a curative instruction for any potential resultant harm from the noted article, or any final instruction regarding the article itself. No objection was lodged during the instruction conference with respect to form, additions or omissions. At the instruction conference the Court and respective counsel had the following colloquy:

> "THE COURT: Gentlemen, I have previously given you the proposed instructions as it relates to the negligence and damages. Mr. Derzon do you have any objections to the form of those instructions?"
>
> "MR. DERZON: No Sir."
>
> "THE COURT: Mr. McCann, do you?"
>
> "MR. McCANN: No." (R. 12/4/79, 148-9).

The Court properly voir dired the jury with respect to the article and was satisfied that the article would not play a part in their deliberations and verdict. (R. 12/5/79, 11-13).

No motion for mistrial was sought by petitioner but rather an objection was delib-

erately waived; "[we] don't want to move for a mistrial." (R. 12/5/79, 9).

The Wisconsin Court of Appeals ruled, in reliance upon Micke v. Jack Walters and Sons Corp., 70 Wis.2d 388, 392 234 N.W.2d. 347, 349 (1975), and Grinley v. Eau Galle, 274 Wis. 177 79 N.W.2d. 797 (1956) that:

> "there is no evidence or indication in this record that the defendant corporation requested such specific instruction when the case was submitted to the jury, therefore, error cannot be predicated upon the omission."

The Court further noted:

> "when instructions are incomplete and do not cover a point that ought to be covered this Court will not reverse unless a timely request for appropriate instructions has been made to the Court." Grinley v. Eau Galle, 274 Wis. 177, 79 N.W.2d. 797-798, (1956) (A. 5).

Petitioner's failure to object to instructions or to request instructions, or to move for mistrial waived any theoretical error.

The contention that the jury was erroneously instructed with respect to gross and net income is answered, ironically, in Mr. Eisenberg's caption on P. 36 of his Petition for Writ of

Certiorari,

> "NO INSTRUCTION WAS SUBMITTED REGARDING THE DEFENDANT'S GROSS INCOME AS OPPOSED TO THE DEFENDANT'S NET INCOME."

The Court of Appeals stated in part at P.6-7 of its decision in quoting Lipinski v. Paculski, 62 Wis.2d 629, 633-634, 215 N.W.2d. 468, 471 (1974),

> "After the jury was instructed the trial judge asked the lawyers for both plaintiff and defendant whether they had any corrections to make or whether there had been any omissions. Both stated they were satisfied with the instructions as given. Under these circumstances an appellant is precluded on appeal from arguing that other additional instructions should have been given." (A. 6-7)

The Court again held that petitioner's failure to request and/or object to instructions constituted waiver of any alleged error (A.7). Substantively, there was no basis for differentiating between gross and net income as the gross income was brought out through questioning of petitioner.

"MR. MELNICK:

Q. I show you what has been marked as Plaintiff's Ex. 16 which purports to be the tax return of Eisenberg's subsidiaries and ask you doesn't the gross receipts show $913,076.71?

A. It is not from law practice." (R.12/4/79,9)

The then defendant did not object to the admission of the tax return into evidence. (R. 12/4/79, 11). Accordingly, the Court did not err in its instructions with respect to income.

The petitioner has never propounded the instruction issue in constitutional dimensions until the instant Petition for Writ of Certiorari, "To preserve a right to appeal one must first raise the issue in the Trial Court." (A. 3), Terpstera v. Soil Test Inc., 63 Wis.2d. at 594. This Court must not, as was argued earlier, consistent with Shelley v. Kraemer, Mich. & Mo., 334 U.S.1; State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 437; State v. Reinhardt, 444 U.S. 1088 (1979), consider issues of purported constitutional magnitude when raised for the first time on appeal. Neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court were presented with or reviewed any constitutional challenge. Walters v. City of St. Louis, 349 U.S. 231.

As in Argument I., petitioner has characterized his position as one of constitutional import, without legal argument and supporting

case law. He further fails to demonstrate what, if any, harm he has suffered as a result of the Court's alleged misdeeds. Mr. Eisenberg has simply created a hypothetical issue which is unsupported in law and in fact. Ashbury Hospital v. Cass County, N.D., 326 U.S. 207; U.S. Fidelity & Guaranty Co. v. State of Oklahoma, 250 U.S. 11.

Any error in instructions to the jury does not constitute a Due Process denial when the proceedings below were before a "duly constituted tribunal in accordance with the law of the state in which the hearing was had and when there was a full opportunity to be heard." Backus v. 4th Street Union Depot Co., 169 U.S. 557, (1898). Furthermore, Due Process requires that there be notice and an opportunity to be heard. If that has occurred the requirements of the federal constitution have been met and the Supreme Court will not determine whether there has been an erroneous instruction of statute or common law by the Court below. Standard Oil v. Missouri, 224 U.S. 270 (1911). Additionally, even if the Trial Court had committed error in admitting evidence or entering a judgment after

a full hearing there is no denial of Due Process. Jones v. Buffalo Coal and Coke Co., 245 U.S. 328 (1917). The 14th Amendment to the United States Constitution does not stand for the proposition in protecting the right of Due Process that the beneficiary must be free from judicial error. Stein v. New York, 346 U.S. 156 (1953); Beck v. Washington, 369 U.S. 541 (1897).

III. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY RENDERED A VERDICT FORM CONTAINING ASSUMED FACTS IN DISPUTE AND THEREFORE INVADED THE PROVINCE OF THE JURY?

Argument 2 of Mr. Eisenberg's Petition charges that the Court submitted an erroneous special verdict form and thereby denied him his right to Due Process. For the third time, the United States Supreme Court is presented with Petitioner's constitutionally phrased argument without prior review by a lower Court. Petitioner not only failed to raise the due process denial at any time before filing of the instant Petition, but neglected to object at trial, propose alternative verdict forms or challenge the same for any reason. Petitioner

persisted in his failure to so object through post-judgment motions. (A. 13-15).

In a conference in chambers, the Court gave counsel for both sides an opportunity to review the verdict form. The following occurred:

> "THE COURT: Are there any other comments or objections to the proposed form of verdict?"
>
> "MR. DERZON: No Judge, not from the plaintiff."
>
> "THE COURT: How about the defendant. Any other objections, Ray?"
>
> "MR. McCANN: No." (A. 12/4/79, 147)

The Court of Appeals in reliance upon Roach v. Keane, 73 Wis.2d. 524, 535, 243 N.W.2d. 508, 575 (1976) found that waiver barred any consideration of the verdict form.

> "We conclude the appellant is precluded from complaining now about the special verdict form. (A. 8).

Mr. Eisenberg's complaint that the verdict form assumes two separate agreements with respect to legal fees is unfounded. Assuming arguendo that the Court erred in its form of verdict, it cannot be said that it invaded the province of the jury or that the petitioner suffered any prejudice therefrom. It is difficult, by

virtue of petitioner's failure to cite portions of the record, to counterargue specific provisions of the record as it relates to the instant argument. However, no due process right has been impinged upon and accordingly no federal question raised. The petitioner's due process charge is wholly without merit and unsupported in authority or in substance.

IV. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT REFUSED TO ADJOURN MOTIONS AFTER VERDICT UNTIL A TRANSCRIPT COULD BE PREPARED?

Petitioner contends that in denying his requested adjournment for post-judgment motions his due process rights were abridged. Nowhere does he cite authority that the Court's discretionary decision constituted error. He further fails to demonstrate how he was harmed other than to nakedly assert a Due Process denial. The Court is again the first tribunal to be faced with suggested constitutional error. Even now as the Court must view petitioner's claim, it has the benefit of no legal authority or demonstration of actual harm. The parties to the post-judgment motions were, to a person,

the same which tried the matter to the jury. How the petitioner was prejudiced and, more importantly, how the Court abused its discretion, remains a mystery throughout Mr. Eisenberg's petition. Mr. Eisenberg must be held to a standard demanding that he demonstrate: 1) That the Court abused its discretion; 2) That it had a prejudicial effect; 3) That as a result of the Court's action the defendant was denied due process of law; and, 4) That the Due Process issue is properly before the Court and is of such import and magnitude as to necessitate certiorari. Upon the foregoing grounds the defendant has failed completely. Shelley v. Kraemer, Mich. & Mo. 334 U.S. 1; Fuller v. Oregon, 417 U.S. 40; Cardinale v. Louisiana 394 U.S. 437. No Due Process rights have been infringed upon as a result of the Trial Court's discretionary decision. Event if the Court had erred in interpreting and applying state and common law, in light of the completed jury determination and in light of the opportunity to be heard, no Due Process denial resulted.

Neblett v. Carpenter, 305 U.S. 297 (1938); Standard Oil Co. v. Missouri, 224 U.S. 270 (1911).

It is not claimed by petitioner that the Court's discretionary act took him by surprise, nor resulted in any actual prejudice. Accordingly, no Due Process denial has occurred. Seaboard Airline R. Co. v. Koennecke, 239 U.S. 352 (1950). A full opportunity was had by all parties to litigate post-judgment motions. Petitioner herein did file post-judgment motions citing 11 different propositions calling for a new trial on the 14th day of January, 1980. (A. 13-15) Petitioner's motions were brought on for argument. On the 7th day of March, 1980, the motions were denied in an Order entered on the 17th day of March, 1980. (A17-18) The Court of Appeals in an Order affirmed by the Supreme Court, (A. 16) properly ruled that the petitioner did not show any "prejudicial" effect due to the transcript not being available to the Trial Court. (A. 8).

V. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE

UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY ALLOWED RESPONDENT'S COUNSEL TO REFER TO PETITIONER AS BEING GUILTY OF MURDER IN THE PRESENCE OF THE JURY?

In Petitioner's argument numbered five (5), not only does Mr. Eisenberg raise a constitutional argument for the first time, but he materially mis-states that which took place during the course of trial. Respondent must again refer the Court to petitioner's failure to raise the substantive issue at trial or through post-conviction motions, from either a constitutional or non-constitutional framework. (A. 13-15)

Petitioner never objected, never moved for mistrial, and never requested a curative instruction. Petitioner's allegation is misleading and erroneous. The claimed charge of:

> "being guilty of murder (Pet.Br. 45) is more appropriately understood by viewing the entire quote from the transcript. Mr. Eisenberg is not the kind to leave a stone (sic) unturned and he is as smart as they come; and he has built an empire on the basis of that intelligence and he has gotten away with murder in a sense, not literally, [in] the sense only how he conducts his affairs; because, he is smart." (R. 12/5/79, 30-31)

Although no objection was made by Mr. Eisenberg the issue was discussed by the parties as follows:

> "MR. McCANN: You claim at one time Mr. Counsel said what about you?"
>
> "THE DEFENDANT: He said, I was a murderer."
>
> "THE COURT: He didn't say that. He said, Mr. Eisenberg was guilty of murder, not in a literal sense." (R. 12/5/79, 38).

Wisconsin case law is consistent in holding that the failure to object to argument believed to be improper constitutes waiver. Ash v. American Family Mutual Ins. Co., 28 Wis.2d. 597, 118 N.W.2d. 58 (1967); Zweifel v. Milwaukee Automobile Mutual Ins. Co., 28 Wis.2d 249 , 137 N.W.2d 6, (1975).

The Court of Appeals found petitioner's claim of prejudicial closing argument to be "misleading and incorrect." (A. 9). The Court held "[t]he appellant waived any alleged error in the closing argument for a mistrial. (A. 9).

No denial of Due Process meriting federal jurisdiction occurred in the instant action

for several additional reasons. There has been no prejudice demonstrated by the petitioner. The constitutional challenge was never raised prior to the filing of the instant petition. Walters v. City of St. Louis, 349 U.S. 231; Cardinale v. Louisianna, 394 U.S. 437. Furthermore, it must be reiterated that the due process does not guarantee the defendant a trial free from error, assuming a complete and full opportunity to be heard. Worcester Co. Trust Co. v. Riley, 302 U.S. 292 (1937). Petitioner has again presented argument to the Court which is wholly without support in law and in substance from the record. Respondent can only request the Court to disregard such allegations.

VI. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES TESTIFYING AGAINST HIM?

Respondent maintains that Monk v. New Jersey 398 U.S. 71; Cardinale vs. Louisianna, 394 U.S. 437 and State v. Reinhardt, 444 U.S. 1088, preclude review of petitioner's claim

of due process denial for failure to allow pro se cross-examination. The petitioner neglected to preserve the issue now before the Court, in any form, either at trial, or post-trial level. Mr. Eisenberg has most certainly failed to properly present and preserve a federal question for the instant review. The Record of Trial reflects that no request was made by petitioner to permit him to conduct cross-examination, pro se, or in addition to his respective counsels. As was stated in Nimmer v. Purtell, 69 Wis.2d at 40 in the absence of a preserved error on the record a reviewing Court cannot consider an issue on appeal. See also Platta v. Flatley, 68 Wis.2d 47, 227 N.W.2d 898 (1975). Accordingly, the Wisconsin Court of Appeals held "we refuse to consider this issue which is raised for the first time on appeal". (A. 10).

Petitioner was, in fact, represented by two attorneys who had full opportunity to cross-examine each and every witness. There

is no authority cited by petitioner, nor uncovered by respondent, creating a right to cross-examine by both counsel and the party itself. Instead, Mr. Eisenberg cites in his brief the unsupported claim that one of his lawyers, Mr. McCann, did not try the underlying tax case, was hard of hearing, and was in his 80's (Pet.Br., 48). Mr. Crowley, it is alleged, "forced Mr. Eisenberg to sit behind the rail of the Courtroom and permitted no communication." (Pet.Br., 48). Mr. Melnick, it is argued, tried to utilize petitioner's assistance of Mr. McCann, "to distort the factual occurrences at trial." (Pet.Br., 47). Respondent again requests the Court to disregard charges of the "unsworn witness" petitioner.

Petitioner erroneously cites Neider v. Spoehr, 41 Wis.2d 610, 165 N.W.2d 171 (1969) to support his claim. The Neider Court did not consider the rights of a party, as opposed to counsel, to conduct cross-examination. More importantly, Mr. Eisenberg failed to explain that the Neider Court imposed limitations on cross-examination

to be determined at the discretion of the Trial Court.

> "It is equally fundamental that a party has a right to cross-examine witnesses who testify against him. However, this right is not without limitation, and the extent of the manner and even the right of multiple cross-examination by different counsel representing the same party can be controlled by the Trial Court so that the trial proceeds in an orderly and fair manner. The exercise of discretion by the Trial Court to deny or restrict cross-examination must be dependent upon the circumstances of the trial. This Court will not reverse unless it clearly appears that the Trial Court abused its discretion and that the error affected a substantial right of the complaining party and probably affected the result of the trial." (P. 617-18)

The petitioner has shown no prejudice. He has not been denied Due Process, but was, rather, adequately represented by two attorneys. No federal question exists and none is properly before the Court.

Pages 49 through 55 of Petitioner's Brief do not appear to be connected to Argument numbered five (5). It cannot be determined where, if at all, petitioner intended the pages to appear. Accordingly, respondent will only state that the

section noted is almost totally unsupported by citations to the record and merely constitutes a potpourri of unsworn testimony. The jury found no alleged act of malpractice, and no federal question is properly presented to the Court within the confines of pages 49 through 55. The pages cited above attempt to re-try both the tax trial and malpractice action. The Court is presented with a rambling seven page discourse on the alleged ills of George Crowley, the petitioner's former lawyer. It is argued that respondent Crowley violated petitioner's constitutional rights. Mr. Eisenberg does not give the Court or respondent insight with respect to what particular rights were violated. Respondent respectfully requests the Court to disregard pages 49 through 55.

VII. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT REFUSED TO OVERTURN THE JURY VERDICT FINDING NO MALPRACTICE?

In argument seven (7) respondent Crowley is accused of violating petitioner's consti-

tutional rights. The Court must decline petitioner's invitation for certiorari for the following reasons: 1) There is no federal question properly preserved and presented; 2) The issue is raised for the first time in any fashion by Writ of Certiorari; 3) The lower Courts were not presented with such allegation; 4) The petitioner was not acting under color of state law, but, rather was functioning in his capacity as a private citizen. The respondent will not reiterate Wisconsion "waiver" arguments heretofore stated but will incorporate by reference previously cited cases in support thereof. Additionally, respondent will rely upon those cases cited in its argument with respect to the Court's approach to issues not raised in the Court below and with respect to hypothetical and unsupported claims of constitutional infringement.

It should be noted, however, that petitioner erroneously places the obligations and limitations

of the 14th Amendment upon private citizen Crowley. Due process rights cannot be abridged by private citizens. Public Utilities Comm. v. Pollack, 343 U.S. 451, (1951).

Petitioner attempts to again re-argue both the underlying tax and malpractice actions. The Supreme Court will not review a State Court decision which is founded upon independent and adequate State grounds. Henry v. State of Mississippi, 379 U.S. 443; Dixon v. Duffy, 342 U.S. 543 (1951); Young v. Rayin, 337 U.S. 235, (1949).

The jury, in its verdict, considered all properly presented allegations of legal malpractice and found that none existed. Petitioner herein attempts through "unsworn testimony" to discredit the verdict together with the Wisconsin Appellate Court's affirmation. As was stated by the Court of Appeals at p. 10 in its Decision;"§VII of the Appellant's Brief sets forth his version of the facts which he was not able to prove to the satisfaction of the Court or jury." (A. 10) The Trial Court would not disagree with the jury verdict, (A.16)

the Court of Appeals refused to upset the decision, (A. 11), but rather stated in citing Coryell v. Connecticut, 88 Wis.2d 310, 317, 276 N.W.2d 729 (1979). On appeal,

> "the obligation of this Court is to search for credible evidence that will sustain the verdict not for evidence to sustain a verdict jury could have but did not reach."

The unsubstantiated charges by petitioner should be disregarded by the Court and certiorari should be denied with respect to issue numbered seven VII.

VIII. DID THE SUPREME COURT OF THE STATE OF WISCONSIN VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WHEN IT REFUSED TO REVIEW THE DECISION OF THE WISCONSIN COURT OF APPEALS, SAID DECISION HAVING BEEN OFFERED BY A JUSTICE AGAINST WHOM PETITIONER FILED A REQUEST FOR SUBSTITUTION?

Petitioner argues in its final contention that Due Process demands an impartial forum, that he filed a timely request for hearing, and that such denial was ignored. Petitioner infers that he had a right to substitution of appellate judge and that he timely filed the same. Wisconsin Statutes governing

substitution of appellate judges, §801.58, does not provide for a substitution of appellate judge nor even for a motion for recusal, (A. 19) Mr. Eisenberg has stated in his brief at p. 62 that his request was for substitution and not recusal. What petitioner has failed to demonstrate is: 1) How a substitution is constitutionally protected; 2) What prejudices he suffered as a result of such denial of constitutional rights; 3) How his request for substitution was provided for by statute or common law; and, 4) How the ruling by the Court of Appeals was from an impartial tribunal.

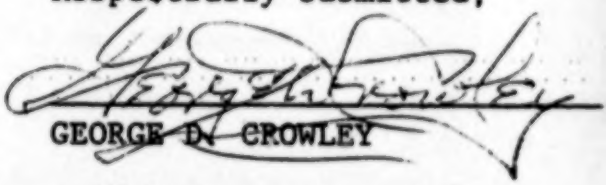
Argument VIII suffers the same infirmities as those in I through VII, to-wit: 1) A failure to preserve the issue in the Court below; 2) A failure to state a federal question; and, 3) A failure to cite the appropriate record provisions and legal authorities. Respondent incorporates by reference arguments previously made on the above issues and respectfully requests

the Court to deny petitioner's request for certiorari.

CONCLUSION

For all the reasons, as stated above, respondent maintains that petitioner has failed to demonstrate any federal question which would allow the Court to review and grant relief and accordingly respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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APPENDIX

Decision of the Court of Appeals of the State of Wisconsin, July 21, 1981	A1-12
Petitioner's Post Judgment Motions	A13-15
Decision of the Supreme Court of Wisconsin, December 7, 1981	A16
Order for Judgment dated March 17, 1980	A17-18
Wisconsin Statute - Section 801.58	A19

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUL 21 1981

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 80-737

NOTICE
This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

GEORGE D. CROWLEY,

Plaintiff-Respondent,

v.

SYDNEY M. EISENBERG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES P. FIEDLER, Judge. Affirmed.

Before Decker, C.J., Cannon, J., and Hanley, Reserve Judge.

HANLEY, Reserve Judge. This appeal arises out of an action commenced by George D. Crowley (respondent herein), to recover attorney's fees owing from his representation of Sydney M. Eisenberg (appellant herein), in a federal criminal trial where it was found that Mr. Eisenberg was guilty of three counts of willfully filing a false income tax return. Mr. Eisenberg countercialmed against Mr. Crowley for legal malpractice.

On December 5, 1979, a jury found for Mr. Crowley on his claim for attorney's fees, and against Mr. Eisenberg on the malpractice counterclaim.

After hearing motions after verdict, the trial judge ruled that there was credible evidence to support the verdict answers, with the exception of the answer to question 1a, regarding the amount owed by Mr. Eisenberg for Mr. Crowley's legal services, which was amended by stipulation from $10,000 to $7,000. Judgment was ordered against Mr. Eisenberg on March 17, 1980. The counterclaim was dismissed on the merits. Mr. Eisenberg appeals.

The following issues are presented on this appeal:

1. Were the motions after verdict timely filed by the respondent in his defense of the appellant in the criminal case?
2. Were the instructions submitted by the trial court to the jury erroneous?
3. Was the special verdict submitted to the jury erroneous?
4. Did the trial court err in refusing to adjourn the motions after verdict until a transcript had been prepared?
5. Did the trial court err in not ordering a new trial based on an improper closing argument by respondent's counsel?
6. Did the trial court err in refusing to allow the appellant to conduct his own cross-examination?

7. Is there any credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant?

Timeliness of Motions

Appellant contends that the trial court erred in ruling, as a matter of law, that respondent's motions after verdict, on behalf of appellant in his criminal trial, were timely filed.

Although the appellant raised eleven separate issues in his post-trial motions, the issue of the appropriateness of the trial court's ruling on the timeliness of respondent's motions after verdict was never raised.

The Wisconsin Supreme Court has consistently held that to preserve a right to appeal, one must first raise the issue in the trial court. The burden is upon the party that alleges error to establish in the record that the error was specifically called to the attention of the trial court. A failure to make a timely objection constitutes a waiver of the objection. Terpstra v. Soiltest, Inc., 63 Wis.2d 585, 594, 218 N.W.2d 129, 134 (1974).

Pursuant to the above authority we hold that the issue is not properly before this court.

Instruction Regarding Newspaper Article

The appellant has alleged that the jury was not properly instructed regarding a newspaper article concerning him which appeared in The Milwaukee Journal during the course of the trial. However, he has failed to incorporate the article in the record on this appeal. He is requesting the court to overturn a jury verdict and a decision of the trial court without submitting the article to the court.

In Nimmer v. Purtell, 69 Wis.2d 21, 230 N.W.2d 258 (1975), the court considered the contention of a party that opposing counsel had made an improper argument to the jury. No record was made of the final arguments, however, and the court stated:

> [W]ith no record this court cannot determine whose recollection of what was said is correct. The rule in Wisconsin is that absent some showing somewhere in the record, the court cannot consider the alleged error. Borowske v. Integrity Mut. Ins. Co., (1963) 20 Wis.2d 93, 98, 121 N.W.2d 287. Purtell, 69 Wis.2d at 40, 230 N.W.2d at 268.

The appellant made no request for any instruction regarding the newspaper article. He made no suggestion to the trial court other than to ask the jury if they had read the article and to instruct that they pay no attention to it.

The court did question the jury and nine members stated that they had read the article. On individual questioning by the trial

court, all nine responded that they could put the article out of their minds in reaching a verdict.

If the appellant wanted anything additional, he should have requested it at the time. If he felt that the article was damaging and the poll of the jury insufficient, he should have made an objection and moved for a mistrial. He elected to take his chances on a jury verdict.

In Micke v. Jack Walters & Sons Corp., 70 Wis.2d 388, 392, 234 N.W.2d 347, 349 (1975), the court stated:

> There is no evidence or indication in this record that the defendant corporation requested such specific instruction when the case was submitted to the jury. Therefore error cannot be predicated upon the omission. As this court has held: "Where instructions are incomplete, and do not cover a point that ought to be covered, this court will not reverse unless a timely request for appropriate instructions has been made to the trial court." (Quoting Grinley v. Eau Galle, 274 Wis. 177, 179, 79 N.W.2d 797, 798 (1956)).

Here an instruction conference was held by the court in chambers, and the proposed jury instructions were approved by counsel for the parties.

We conclude that appellant's failure to object to the instructions precludes him from raising an objection to the instruction on this appeal.

The appellant also argued that the jury was not properly instructed on the difference between his gross income and his net income. Defendant's income record was a factor in establishing his damages.

Appellant himself, through the questioning of his attorney, referred to his 1975 income tax return.

He was then questioned by respondent's attorney, Mr. Melnick:

> Q I show you what has been marked as plaintiff's exhibit 16, which purports to be the tax return of Eisenberg subsidiaries and ask you doesn't the gross receipt show nine hundred thousand seventy six dollars and seventy one cents?
>
> A It is not from law practice.

The return was admitted into evidence without objection. At no time was a motion for a mistrial made. Appellant also failed to submit an instruction to the court. In ruling on a similar issue in Lipinski v. Pakulski, 62 Wis. 628, 633-34, 215 N.W.2d 468, 471 (1974), the court said:

> After the jury was instructed, the trial judge asked the lawyers for both plaintiff and defendant whether they had any corrections to make or whether there had been any omissions. Both stated that they were satisfied with the instructions as given.
>
> Under these circumstances, an appellant is precluded on appeal from arguing that other additional instructions should have been given. The instructions

that were given were not erroneous. Even under the plaintiff's theory of the case, the most that could be said is that they were incomplete. We have however, repeatedly stated:

"Where instructions are incomplete and do not cover a point that ought to be covered, this court will not reverse unless timely request for appropriate instructions has been made to the trial court. Grinley v. Eau Galle, (1956), 274 Wis. 177, 79 N.W.2d 787." Carson v. Pope, (1961), 15 Wis.2d 300, 306, 112 N.W.2d 693 [,696.]

We hold that the appellant waived any alleged error in the trial court's instructions to the jury by not objecting to the instructions given or offering his own additional instructions.

Form of Special Verdict

Appellant contends that the form of the special verdict was erroneous. Neither at the time the special verdict was presented to counsel nor in his motions after verdict did the appellant raise the issue he raises on appeal. Both attorneys for the parties agreed with the court on the form of the special verdict as submitted to the jury.

In Roach v. Keene, 73 Wis.2d 524, 243 N.W.2d 508 (1976), the court was faced with an almost identical situation. There the appellant also failed to object to the special verdict before it was submitted to the jury, and neglected to raise the issue on motions after verdict. The court held that under these circumstances, there can be

no question that the defendant is not entitled to assert error on appeal. Id. at 535, 243 N.W.2d at 515.

We conclude the appellant is precluded from complaining now about the special verdict form.

Adjournment of Motions After Verdict

Appellant asserts that the trial court abused its discretion in failing to adjourn the post-trial motions until a transcript could be completed. However, he fails to show with any degree of specificity what particular error the trial judge made in ruling on the post-trial motions because a transcript was not available to him at that time.

Appellant has not shown any prejudicial effect due to the transcript not being available to the trial court. Appellant has not asked for any particular relief in his brief because of this alleged error.

Under the circumstances we conclude that the trial court did not abuse its discretion in refusing to adjourn the motions after verdict until the transcript was available.

Closing Argument of Counsel

The appellant claims that counsel for the respondent, in his

closing argument, referred to appellant as "being guilty of murder." The claim is misleading and incorrect. The record discloses that respondent's counsel, in his closing argument, stated to the jury:

> Mr. Eisenberg is not the kind to leave a stove [sic] unturned and he is smart as they come; and he has built an empire on the basis of that intelligence and he has gotten away with murder in a sense, not literally [i]n the sense only how he conducts his affairs; because, he is smart. Transcript of December 5, 1979 at 30-31.

At no time was any objection or a motion for a mistrial made by the appellant.

In Zweifel v. Milwaukee Automobile Mutual Insurance Co., 28 Wis.2d 249, 256, 137 N.W.2d 6, 11 (1965), the court held that if particular arguments were thought improper, it was incumbent upon counsel to move for a mistrial before the jury returned its verdict or else the complaint was deemed waived.

We hold the appellant waived any alleged error in the closing argument by failing to move for a mistrial.

Cross-Examination of Witnesses

The appellant now, for the first time, has raised an issue of whether it was error for the trial court to deny him an opportunity to cross-examine witnesses.

There is nothing in the record indicating that a request was made to the trial court to permit appellant to conduct cross-examination. His attorney, Mr. McCann, was allowed to cross-examine witnesses. Appellant has cited no authority that both a party and his attorney can conduct cross-examination.

The absence of a request to the court on the record and the absence of this issue on motions after verdict are fatal to the appellant. As the court said in Platta v. Fistley, 68 Wis.2d 47, 63, 227 N.W.2d 898, 907 (1975): "The plaintiff alleges prejudicial error on the part of the trial court in not permitting the plaintiff to pursue certain lines of cross-examination. Not only are the plaintiff's allegations of error unclear but they are not raised on posttrial motions. The objection comes too late."

We refuse to consider this issue which is raised for the first time on appeal.

Question of Credible Evidence

Section VII of the appellant's brief sets forth his version of the facts which he was not able to prove to the satisfaction of the court or jury.

Both Mr. Crowley and Mr. Manning testified about the trial strategy, the facts underlying the jury waiver by appellant, and the decision not to call appellant as a witness.

The appellant has not presented a proper issue for appeal in this section. All of his contentions were controverted by respondent's experts. His experts were controverted by respondent's experts. The standard for overturning a jury verdict on a factual question is well established. In Meurer v. ITT General Controls, 90 Wis.2d 438, 450-51, 280 N.W.2d 156, 162-63 (1979), the court said:

> The standard of review of a jury verdict is that it will not be upset if there is any credible evidence to support it. The evidence will be viewed in the light most favorable to the verdict. May v. Skelley Oil Co., 83 Wis.2d 30, 35, 264 N.W.2d 574 (1978); Nelson v. Travelers Ins. Co., 80 Wis.2d 272, 282, 283, 259 N.W.2d 48 (1977). This is especially true where, as here, the verdict has the approval of the trial court. Upton v. Tetro, 68 Wis.2d 562, 570, 229 N.W.2d 691 (1975). The credibility of witnesses and the weight given to their testimony are left to the judgment of the jury, and where more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the jury. Roach v. Keane, 73 Wis.2d 524, 536, 243 N.W.2d 508 (1976). On appeal the obligation of this court is to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach. Coryell v. Conn, 88 Wis.2d 310, 317, 276 N.W.2d 723 (1979).

Under the above standards of review we are satisfied that there is ample credible evidence to support the verdict of the jury in

its finding that the respondent was not negligent in his representation of the appellant in the tax case. The judgment is correct and must be affirmed.

By the Court.--Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COUET MILWAUKEE COUNTY

GEORGE D. CROWLEY

Plaintiff

vs.

Case No. 455-500

SYDNEY M. EISENBERG

Defendant

The defendant moves the Court above named for Judgment of Dismissal of the plaintiff's Complaint on its merits notwithstanding the verdict of the jury, and for judgment in favor of the defendant on his Counterclaim for the least amount an impartial jury could assess because the verdict is contrary to law and to evidence.

In the event the foregoing Motion is denied the defendant moves the Court for a new trial for the following reasons:

a. Because of passion, prejudice and perversity on the part of the jury.

b. In the interests of justice.

c. Because of improper argument and improper conduct by the plaintiff's counsel, as well as prejudicial and improper remarks.

d. Because the jury's answers to the questions bore no relationship to proof offered at the trial.

e. Because of errors by the Court in not striking from the record testimony improperly submitted to the court and the jury; as an example, the counsel for the plaintiff improperly took from an income tax return the figure of $900,000.00 on a yearly tax return indicating improperly and wrongfully informingthe jury that the defendant had earned $900,000.00 in one year, said representation being completely false insofar as the net income was concerned. The Court has indicated

that he would instruct the jury with reference to an agreed net amount lost by the defendant from his law practice, namely $14,000.00 per year, thus explaining away the $900,000.00 figure which undoubtedly inflamed the jury. The Court failed to do so, and, further, there was other evidence improperly presented to the jury.

f. Misconduct on the part of the counsel for the plaintiff with respect to facial grimaces to the jury, and other misconduct on his part with reference to the trial of the case.

g. Error by the Court in submitting instructions to the jury prior to the presentation of the respective cases which became even more significant because of the length of the trial.

h. Errors in instructions to the jury.

i. Counsel for the plaintiff specifically informed the jury that defendant was a "murderer."

j. Permitted the trial to the jury to continue to sit in face of adverse newspaper publicity at or about the conclusion of the testimony, most of the jury admitted on the record they saw the adverse article; the defendant was not provided with an opportunity to question the jurors as to the effect on the jury, such questions being unnecessary in any event because of the nature of the adverse and prejudicial article.

k. The Court erred in unreasonably limiting the expert witnesses during the court trial after some of the expert witnesses had testified; the defendant had available additional expert witnesses whose testimony would have substantially assisted in the defense and with the Counterclaim of the defendant.

In the alternative, the defendant moves that the answers to the questions of theverdict be modified and changed to conform with the

evidence both to the Complaint and the Counterclaim; in the further alternative, with respect to the Counterclaim of the defendant, defendant moves that the plaintiff be found negligent as a matter of law, because of the following reasons:

a. The plaintiff did not interview available witnesses.

b. The plaintiff waived a jury at a pre-trial conference without the permission of the defendant, thus making any subsequent waiver by him a severe testing of his credibility by the judge.

c. Failure by plaintiff to permit the defendant to testify and failure to procure for testimony the many witnesses who had a substantative defense for defendant at the Tax Criminal trial. All of same were available for testimony but not one was called to testify on behalf of the defendant.

Dated this 14th day of January, 1980.

Ray T McCann

RAY T. McCANN
Attorney for Defendant

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

David A. Malnick
Jacobson, Sodos, Malnick & Krings
152 West Wisconsin Ave.
Milwaukee, WI 53203

Sydney M. Eisenberg
1131 West State St.
Milwaukee, WI 53233

To

Ray T. McCann
152 West Wisconsin Ave.
Milwaukee, WI 53233

Madison, December 7, 1981

Hon. James P. Fiedler
Circuit Court of Iowa County
County Courthouse
Dodgeville, WI 53533

The Court today announced an order in your case as follows:

No. 80-737 Crowley v. Eisenberg

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Sydney M. Eisenberg, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

MARILYN L. GRAVES

Clerk of Supreme Court

SC-105

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

GEORGE D. CROWLEY,

Plaintiff,

-vs-

SYDNEY M. EISENBERG,

Defendant.

ORDER FOR JUDGMENT

CASE NO. 455-500

The above captioned matter having come on for jury trial on the 26th day of November, 1979, and the jury having rendered it's verdict on the 5th day of December, 1979; counsel for the parties having prepared and filed their respective motions after verdict, and having appeared for oral arguments on the 7th day of March, 1980, the plaintiff appearing by his attorneys, Jacobson, Sodos, Melnick and Krings, S.C., by David Melnick and Alan Derson, the defendant appearing by his attorney, Ray T. McCann; and the Court having heard argument, considered the evidence offered at the trial herein, and determined that there was credible evidence in the record to support the verdict answers with the exception of the answer to Question 1a which has been amended by the stipulation of counsel from Ten Thousand Dollars ($10,000.00) to Seven Thousand Dollars ($7,000.00),

NOW THEREFORE, upon all the records, files and proceedings herein,

IT IS ORDERED:

1. That the plaintiff be granted judgment against the defendant in the sum of Fourteen Thousand Eight Hundred and Thirty-Eight Dollars ($14,838.00) with interest thereon at the rate of 7% per annum together with their costs and disbursements.
2. That the counterclaim of the defendant against the plaintiff shall be dismissed upon the merits.

Let judgment be entered accordingly.

Dated this 17 day of March, 1980.

BY THE COURT:

James P. Fiedler,
Circuit Court Judge

801.58 Substitution of judge. (1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(2) After the written request has been filed, the named judge shall have no further jurisdiction in the action or proceeding except that the judge shall determine if the request is correct as to form and timely filed. If the request is correct as to form and timely filed, the named judge shall be disqualified and shall promptly request assignment of another judge under s. 751.03. The newly assigned judge shall proceed under s. 802.10.

(3) Except as provided in sub. (7), no party may file more than one such written request in any one action, nor may any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

(4) Upon the filing of an agreement signed by all parties to a civil action or proceeding, by the original judge for which a substitution of a new judge has been made, and by the new judge, the civil action or proceeding and pertinent records shall be transferred back to the original judge.

(5) In addition to other substitution of judge procedures, in probate matters a party may file a written request specifically stating the issue in a probate proceeding for which a request for substitution of a new judge has been made. The judge shall thereupon be substituted in relation to that issue but after resolution of the issue shall continue with the administration of the estate. If a person wishes to file a written request for substitution of a new judge for the entire proceeding, subs. (1) to (4) shall apply.

(6) (a) In probate matters ss. 801.59 to 801.62 apply, except that upon the substitution of any judge, the case shall be referred to the register in probate, who shall request assignment of another judge under s. 751.03 to attend and hold court in such matter.

(b) Ex parte orders, letters, bonds, petitions and affidavits may be presented to the assigned judge, by mail or in person, for signing or approving, wherever the judge may be holding court, who shall execute or approve the same and forthwith transmit the same to the attorney who presented it, for filing with the circuit court of the county where the records and files of the matter are kept.

(7) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the entry of the judgment or decision of the appellate court whether or not another request was filed prior to the time the appeal or writ of error was taken.

END OF DOCKET